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OF

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OF THE

SUPREME COURT OF WISCONSIN

DURING THE PERIOD COMPRISED IN THIS VOLUME

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Attorney General - - WALTER C. OWEN

Clerk - - - CLARENCE KELLOGG

MEMORANDUM.

Mr. Justice SIEBECKER took no part in the decision of the cases reported in this volume on pages 1 to 130, 140 to 340, and 352 to 407.

ERRATUM.

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Page 271, line 21. For *Affirmed*, read *Reversed*.

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CASES DETERMINED

AT THE

January Term, 1914.

MAAHS, Respondent, vs. ANTIGO LUMBER COMPANY and another, Appellants.

January 15—February 3, 1914.

Master and servant: Injury: Settlement: Pleading: Election between causes of action: Employers' liability insurance: Cancellation of policy: Rights of injured employees: Corporations: Personal liability of manager: Appeal: Orders reviewable.

1. Where, in an action for personal injuries to an employee, the complaint stated a cause of action for tort and also a cause of action based on an agreement for settlement, plaintiff had at least the right to elect to prove his cause of action for tort.
2. Evidence in such case which tended to show that a settlement of plaintiff's claim agreed upon between the parties was conditional upon approval thereof and payment of the amount by an employers' liability insurance company, but which failed to show such approval or that the insurer paid the sum agreed upon on account of plaintiff's injury, is *held* insufficient to show a settlement agreement.
3. There being no contractual relation between injured employees and a liability insurance company which has issued a policy to the employer, such company and the employer may agree to the surrender and cancellation of the policy on such terms as they see fit.
4. Where several actions by injured employees were pending when the employer and a company which had insured against such liability made an agreement whereby, upon payment of a certain sum to the employer, the policy was canceled, but there was nothing in the agreement whereby the money so paid was impressed with any trust in favor of any one, the plaintiff in one of said actions was not entitled to recover on the theory that a part of such money rightfully belonged to him.
5. In an action for personal injuries against a corporation and its president, a complaint alleging as to the latter that he owned

all of the stock of the corporation except two shares held by employees, that as president and manager he had full and absolute control and supervision of the operation of the sawmill in which plaintiff worked and of assigning employees to their respective duties, that it was the duty of defendants to provide safe and suitable machinery and to securely guard the gearing and shafting so located as to be dangerous, and that they failed in such duty, by reason whereof plaintiff was injured, is *held* to state a cause of action against such individual defendant.

6. There are cases in which the manager of a corporation is equally liable with it for its torts.
7. An order directing the payment of money into court to abide the result of the action becomes part of the judgment roll, and under sec. 2872, Stats., may be reviewed on an appeal from the judgment without any exception having been taken thereto.

APPEAL from a judgment of the circuit court for Langlade county: JOHN GOODLAND, Circuit Judge. *Reversed.*

The plaintiff, an employee of the *Antigo Lumber Company,* commenced an action against said company to recover $3,000 damages for a personal injury received in the course of his employment. Later a motion was made to amend the complaint. The proposed amendment set forth that one *O. G. Erickson* was the managing officer of the company and had full control and supervision of the operation of the mill and of assigning the employees to work on the various machines in the mill, and was personally liable to the plaintiff for his injury; that *Erickson* owned practically all of the stock in the corporation and that the board of directors therein consisted of himself and two employees in his office, and that he was practically the owner of the sawmill in which the plaintiff was injured. The amendment further set forth that the *Antigo Lumber Company* was hopelessly insolvent since July, 1911; that at the time the plaintiff was injured the *Antigo Lumber Company* was insured in the Ætna Life Insurance Company against loss and damage by reason of injuries received by its employees; that the action

was begun in June, 1911, and that thereafter some negotiations were had in reference to settling the case; that in the month of October, 1911, an agreement was made between the attorneys representing the plaintiff, and *Erickson* acting in his own behalf and in behalf of his codefendant, to settle the case for $1,000, provided the insurance company would approve of such settlement and furnish the money to make the payment; that the insurance company believed the plaintiff had a valid claim against the *Antigo Lumber Company* and would eventually upon the trial of the case recover judgment against said company and that the insurance company would be liable therefor under its policy of insurance, and that said insurance company was ready and willing to settle and compromise the suit by paying the sum of $1,000 in compensation for the loss and damage sustained by the plaintiff; that said *Erickson,* acting for himself and his codefendant, instead of requesting the insurance company to compromise and settle the action upon the basis of the offer made by the plaintiff, as he agreed to do, entered into an agreement with the insurance company whereby the *Antigo Lumber Company* "did release and forever discharge said Ætna Life Insurance Company from all liability under said policy on account of personal injuries suffered by the plaintiff and for its ultimate liability to make compensation for the loss and damage so sustained by the plaintiff, on payment of $1,500 to him by said Ætna Life Insurance Company, and said *Erickson* thereupon accepted and received the said sum of $1,500 from the Ætna Life Insurance Company and wrongfully and fraudulently appropriated the same to his own use and the use of the defendant *Antigo Lumber Company,* . . . and refused to pay or turn over said sum or any part or portion thereof to the plaintiff."

The proposed amendment further set forth that the sum of $1,500 paid by the insurance company to the defendant was paid on account of and as compensation for the loss sus-

tained by the plaintiff and was intended by the insurance company to be in payment and discharge of its liability arising on account thereof under and by virtue of said policy of insurance, and that $1,000 thereof rightfully and equitably belonged to the plaintiff and was received by the defendant *O. G. Erickson* as money belonging to the plaintiff. It was further alleged that the act of the defendants in making said settlement with said insurance company and executing said release and discharge and in appropriating and diverting said moneys to their own use was wrong and unlawful; that said *Erickson* then and for a long time prior thereto well knew that the *Antigo Lumber Company* was insolvent and that no judgment plaintiff might recover against the *Antigo Lumber Company* could be collected on execution or otherwise, and that the settlement by said *Erickson* and the diversion of said money by him was made with intent wrongfully to cheat and defraud the plaintiff and wrongfully secure to himself and to said *Antigo Lumber Company* pecuniary profit and gain on account of their own negligence and wrongful acts in crippling and maiming the plaintiff.

Coupled with this motion to amend, the plaintiff also moved for an order requiring the defendants to pay into court *pendente lite* the sum of $1,500 received from the insurance company. The demand for judgment in the amended complaint, as in the original complaint, was for $3,000 damages for the injuries received. The motion to amend the complaint was granted, and the same order also required the defendants to pay the sum of $1,500 into court during the pendency of the action, and to abide the further order of the court.

The defendants answered separately to the complaint. The *Antigo Lumber Company* denied negligence on its part, and set up contributory negligence on the part of the plaintiff, admitted insurance in the Ætna Life Insurance Company, and alleged that it had no right of action against said

insurance company until such time as judgment was recovered by the employee claiming damages and such judgment was paid by the defendant lumber company. The defendant *Erickson* answered, denying all liability on his part as well as most of the material allegations of the complaint.

On the issues thus made up the plaintiff sought to prove a cause of action in tort against the defendants. The court, after examining the pleadings, held that the only issue was whether or not a settlement had been made, and refused to permit the plaintiff to go further than to show that he was in the employ of the *Antigo Lumber Company* and was injured while in such employ and that the settlement of his claim was made and agreed upon.

The court also refused to permit the defendant to offer any evidence tending to show that there was no liability on the part of the *Antigo Lumber Company* for the injury which plaintiff received. The defendants' evidence was confined to the issue of settlement. After hearing the evidence the court directed a verdict for the plaintiff against both of the defendants for $1,000, and defendants appeal from this judgment.

The cause was submitted for the appellant *Antigo Lumber Company* on the brief of *Morson & Smelker;* for the appellant *Erickson* on that of *Henry Hay* and *F. J. Finucane;* and for the respondent on that of *Goodrick & Goodrick,* attorneys, and *T. W. Hogan,* of counsel.

To the point that there was no privity of contract between the employee and the insurance company, counsel for the appellant *Erickson* cited *Stenbom v. Brown-Corliss E. Co.* 137 Wis. 564, 119 N. W. 308; *Carter v. Ætna L. Ins. Co.* 76 Kan. 275, 91 Pac. 178; *Connolly v. Bolster,* 187 Mass. 266, 72 N. E. 981; *Bain v. Atkins,* 181 Mass. 240, 63 N. E. 414.

Barnes, J. It would seem to have been the intention of the pleader to state a cause of action for tort in the amended

complaint and to compel the defendants, because of the insolvency of the *Antigo Lumber Company,* to pay the money received from the insurance company into court to the end that the same might be applied in satisfaction or partial satisfaction of any judgment that might be recovered for the tort. Conceding that a cause of action based on a settlement was also stated, the plaintiff at least had the right to insist on proving his cause of action in tort. He was not even given the right of election, and in this we think the court was clearly in error. The plaintiff, however, is seeking in this court to sustain the judgment recovered, and if the evidence warranted the direction of the verdict returned the defendants have no cause for complaint.

However shady the transaction between *Erickson* and the insurance company may appear, and it does appear shady on *Erickson's* part, we fail to see how the ruling of the court in directing a verdict can be approved. This is so for two reasons: First, because the plaintiff's evidence fails to show that a settlement was made, and, second, because there was ample evidence offered by the defendants tending to show that a settlement was not made, to warrant the jury in so finding.

The evidence offered on behalf of the plaintiff tended to show that settlements of the claim of the plaintiff and of that of Grall were made with *Erickson* for $1,600, provided the insurance company would approve of the settlements and pay the amounts agreed upon, and that plaintiff was to recover $1,000 and Grall $600. The plaintiff's evidence did not show that the insurance company agreed to such settlements or either of them or that it paid the sum agreed upon on account of the injury which plaintiff received. In this respect the proof was insufficient and fell short of establishing a settlement agreement.

The evidence of *Erickson* was to the effect that he simply agreed to transmit any proposition for settlement which plaintiff or Grall might make to the insurance company, and

that he was willing to settle on any basis which was satisfactory to the insurer. He further testified that propositions to settle on the basis above stated were made to him and that the insurance company refused to consider the matter of settling with the plaintiff on any such basis.

A written contract was made between *Erickson* and the insurance company whereby in consideration of $1,500 the insured agreed to surrender its policy of insurance and to relieve the insurer of all further liability thereon. The contract further provided that the *Antigo Lumber Company* should employ counsel and defend all personal injury actions pending against it, including those brought by the plaintiff and Grall. Upon the insistence of the insurance company there was paid out of the amount agreed upon to the attorney which the lumber company agreed to employ the sum of $442.18, and there was a further deduction of $57.82 made on account of unpaid premiums on the policy.

At the time of the surrender of the policy there were three personal injury actions pending against the *Antigo Lumber Company,* one brought by the plaintiff to recover $3,000 damages, one brought by one Henry Larson to recover $25,000 damages, and one brought by Grall. The amount of damages claimed in the Grall case does not appear, but it does appear that Grall was willing to settle for $600. It does not appear whether or not there were any other claims of a like nature on which suit had not been brought.

There was no contractual relation between the injured employees of the *Antigo Lumber Company* and the insurance company. *Stenbom v. Brown-Corliss E. Co.* 137 Wis. 564, 119 N. W. 308; *Carter v. Ætna L. Ins. Co.* 76 Kan. 275, 91 Pac. 178. This being so, the parties to the insurance contract might agree to its surrender and cancellation on such terms as they saw fit. The amount actually paid to the defendants was $1,000. But treating the amount paid to the attorney as a payment to the defendants, still the sum turned over was $157.82 short of the amounts which plaint-

iff and Grall agreed to accept. Then it was manifest that the insurance company by its contract with the insured relieved itself from all liability on the $25,000 suit brought by Larson, as well as any other claims that might exist on account of injuries received by the employees of the *Antigo Lumber Company*. It denied liability on account of the *Maahs* and Grall claims as well as on account of the Larson claim. There was nothing in the contract between the insurer and the insured by which the money paid to the latter was impressed with any trust in favor of any one. *Bain v. Atkins,* 181 Mass. 240, 63 N. E. 414. It is therefore quite clear that no case was made and no facts existed which would warrant a recovery upon the theory on which one was allowed.

The plaintiff should have been allowed to prove his cause of action in tort. It is not so clear that the complaint states a cause of action against *Erickson*. There are of course cases in which the manager of a corporation is equally liable with it for its torts.

The complaint charged that *Erickson* was the president and manager of the corporation and had full charge, management, control, and supervision of the erection, construction, and subsequent operation of the sawmill in which the plaintiff was injured; that said *Erickson* acting as the president and manager had full and absolute control and supervision of the operation of the sawmill and of assigning employees to operate the various machines thereof and to fill the different positions necessary for operating and running the mill; that it was the duty of the defendants to provide safe and suitable machinery and appliances for the plaintiff's use and to securely guard all gearing and shafting so located as to be dangerous to the plaintiff in the discharge of his duties; that the defendants provided machinery and appliances in the way of an unguarded gearing which was not safe and in which the plaintiff was injured. The complaint further set forth that *Erickson* was the practical owner of the sawmill, owning all of its stock

except two shares which were held by two of the employees of the corporation.

We think, under the liberal rules adopted for the construction of pleadings, these allegations are broad enough to admit proof of facts which would warrant a jury in finding that *Erickson* was liable to the plaintiff for his injury as well as the *Antigo Lumber Company.*

The point is made that the order amending the summons and complaint and directing the payment of $1,500 into court by the defendants cannot be reviewed because no appeal was taken therefrom within the time limited by law and because the same, with the exceptions taken thereto, was not incorporated in the bill of exceptions.

We do not decide that the order was not properly appealed from. It was part of the judgment roll under sec. 2898, Stats. It could therefore be reviewed on an appeal from the judgment without any exception having been taken thereto. Sec. 2872, Stats.

By the Court.—So much of the order as directed the defendants to pay the sum of $1,500 into court is reversed. The judgment is reversed, and the cause is remanded for a new trial against both of the defendants.

MURPHY, Respondent, vs. INTERLAKE PULP & PAPER COMPANY, Appellant.

January 15—February 3, 1914.

Master and servant: Negligence: Safe working place: Injury: Contributory negligence: Pleading: Definiteness.

1. **In an action by a member of a crane crew for injuries alleged to have been sustained through slipping on the icy floor of a flat car upon which defendant operated a steam crane, the complaint is *held*, on demurrer, to show negligence of the defendant in failing to make the place of employment as free**

from danger as the nature of the employment would reasonably permit (sec. 2394—48, and sub. 11, sec. 2394—41, Stats. 1911), and not to show contributory negligence as a matter of law.

2. Vagueness and indefiniteness in a pleading must be challenged, not by demurrer, but by motion to make more definite and certain.

APPEAL from an order of the municipal court of Outagamie county: THOMAS H. RYAN, Judge. *Affirmed.*

Action for personal injury. January 24, 1912, plaintiff, while in the discharge of his duty as member of a crane crew, consisting of more than four persons, was injured by slipping upon a flat car, upon which the defendant, who had not elected to come in under the Workmen's Compensation Act of 1911, operated a steam crane. The general ground of liability charged in the complaint was that defendant failed to provide a safe place of employment as required by ch. 485, Laws of 1911, and more specifically by secs. 2394—48 and 2394—49, sub. 1, Stats. 1911. The defendant demurred to the complaint, and from an order overruling the demurrer it appealed.

C. G. Cannon, for the appellant.

For the respondent there was a brief by *Bouck & Hilton* and *John F. Kluwin,* and oral argument by *E. J. Dempsey.*

VINJE, J. The first ground of demurrer is that it appears upon the face of the complaint that the defendant has been guilty of no actionable negligence or breach of any legal duty it owed to the plaintiff. Among other allegations of negligence the complaint contained the following:

"That defendant negligently permitted the floor of said flat car upon which said crane was located to become and remain in an unsafe, defective, and dangerous condition of repair in this, that at one end thereof and at a point in the floor of said crane car where plaintiff and his fellow workmen were obliged to pass over, step upon, stand, and remain while performing their said duties, there were depressions and holes, which at and prior to the time plaintiff suffered and

sustained the injuries herein complained of were filled with water and ice. That defendant negligently permitted water used on said crane car to run over and upon the floor of said crane car, well knowing that the same would run into and fill the holes and depressions in the floor of said car and freeze.

"The defendant company negligently failed to adopt a safe and suitable system of repair and inspection to protect said car from becoming unsafe because of water running thereon and thereover and because of snow and ice accumulating in the depressions and holes in the floor of said crane car.

"The defendant negligently failed to provide plaintiff with suitable and proper tools, appliances, or means to prevent said water from running over the floor of said car and into said holes and depressions or from preventing the formation or removal of the ice thereon."

The second ground of demurrer is that the complaint shows upon its face that plaintiff's own negligence was the proximate cause and the only cause of the injuries he sustained. The main allegation of the complaint, showing just how the injury occurred, and upon which the defendant evidently relies to sustain this contention, is as follows:

"That on said 24th day of January, 1912, and while in the performance of his duties and immediately after plaintiff had coupled said crane car to a flat car, the engineer gave a whistle signal that he was about to stop for water, whereupon the plaintiff, whose duty it was to arrange for the taking on of water, immediately started for the crane so as to be ready to take on water when the crane stopped at the hydrant, and in order to reach a proper position to do this work it was necessary for the plaintiff to pass over the said flat car upon which the crane was located at a point where said holes and depressions made the floor of said car slippery and unsafe because of water and ice that had been negligently permitted to accumulate and remain thereon, and while passing on to said car and over said passageway the plaintiff, in the exercise of due care and without fault on his part and solely because of the defective, dangerous, and unsafe condition of the floor of said car as hereinbefore stated, lost his footing, fell, and was thrown from said car to the ground below, thereby suffering the injuries hereinafter stated."

No liberal rule of construction even need be invoked to sustain the complaint as against both objections. A failure on the part of the defendant to provide a safe place of employment as required by secs. 2394—48, 2394—49, Stats. 1911, is clearly stated, as well as other grounds of negligence. The complaint effectively negatives the fact that the place of employment was as free from danger as the nature of the employment would reasonably permit, and that charges a breach of statutory duty. Secs. 2394—48, 2394—41, sub. 11, Stats. 1911. *Sparrow v. Menasha P. Co.* 154 Wis. 459, 143 N. W. 317; *Tallman v. Chippewa S. Co.* 155 Wis. 36, 143 N. W. 1054.

The allegations with reference to how the injury happened do not as a matter of law show contributory negligence on the part of the plaintiff, and the defense of assumption of risk is taken away by sec. 2394—1, Stats. 1911.

Contention is also made that the complaint is vague and indefinite, especially as to just how the accident happened and what injuries were sustained. The demurrer does not reach such defects, if any there be. They must be challenged by a motion to make the complaint more definite and certain.

By the Court.—Order affirmed.

LAUERMAN BROTHERS COMPANY, Appellant, vs. RIEHL, Garnishee, Respondent.

January 15—February 3, 1914.

Fraudulent conveyances: Conditional sales: Chattel mortgages: Stock in trade: Filing statements: Assignment of book accounts.

1. So far as the rights of creditors are concerned, an agreement by which a stock of merchandise is transferred upon deferred payments, with the provision that the business shall be continued, the stock kept up by new purchases, and the vendor

have the title of the entire stock, including the additions, as security for the purchase price, is in legal effect a chattel mortgage and is governed by the provisions of sec. 2316*b*, Stats., notwithstanding the parties have called it an agreement of conditional sale.

2. Words merely indicating an intention to make a transfer of book accounts at some future time, unaccompanied by delivery of the books or the accounts or by any other act indicating an intention to relinquish control over the accounts or pass the title to the alleged assignee, did not constitute a valid assignment as against creditors of the assignor.

APPEAL from a judgment of the municipal court of Outagamie county: HENRY KREISS, County Judge and Acting Municipal Judge. *Reversed.*

The plaintiff sued Komp, a general merchant at Black Creek, Wisconsin, and garnished *Riehl*. Judgment was rendered against Komp on the main action for $416.73 and costs. The garnishee action was tried by the court, and the following facts appeared: *Riehl* originally owned the business afterwards conducted by Komp and transferred the same to Komp in December, 1911, under a conditional or executory contract of some nature, which is not in evidence and which provided for payment of the consideration in the future. This contract was never filed, but Komp took possession of the stock and conducted the business until July 9, 1912, when the parties entered into a new arrangement which took the place of the former, and which is claimed by the plaintiff to be a chattel mortgage, and by the garnishee to be an agreement of conditional sale.

This agreement, after stating the property transferred, the amount of the consideration, and the manner in which payment was to be made in the future, proceeded as follows:

"Second party agrees to furnish first party a true written statement every three months from the date hereof, of the amount of stock sold and amount purchased and added to the stock and also the amount of outstanding indebtedness against added stock for purchase price.

"Party of the second part agrees to keep the stock up in

proper shape by purchases of new stock so that the stock shall be at all times merchantable stock, pay for the same, and keep party of the first part secure.

"Party of the second part agrees to keep the stock insured in a good insurance company to be named by party of the first part in the sum of $4,500 and pay the premium with loss, if any, payable to party of the first part, and in the event of second party failing to insure, party of the first part may insure and charge the amount against the purchase price.

"Party of the first part agrees not to engage in the shoe or gent's furnishing business in Black Creek or vicinity during the term of this contract.

"It is mutually agreed and understood that this is and shall be considered a conditional sale, that the title to this property and all additions thereto during the life of this agreement, and until the full purchase price has been paid, is and shall remain in party of the first part, and upon the failure of the party of the second part to fully carry out any of the agreements and conditions herein, or at any time party of the second part deems himself insecure, he may take unquestioned possession of the stock in any manner he may choose."

This contract was duly filed in the office of the village clerk, but no statements of sales were ever filed. Komp conducted the business until November 11, 1912, when he absconded and the respondent, *Riehl,* took possession of the stock and the accounts. Prior to the trial of the garnishment action *Riehl* had collected $280 on the accounts, and had uncollected accounts still in his possession, but which were collectible, amounting to $150 in value. The garnishee does not claim that Komp at any time delivered to him the accounts or the books of account with words of present assignment or transfer, but simply that Komp said to him at one time when he (*Riehl*) told him (Komp) that he was selling more than he was buying, "I don't want to beat you in any way; I want to deal fair and square and honest, and I will turn over the book account, which you can hold;" and at another time, "It is certain we have to carry people here on account; the amount

the stock is down will be on the book account, and I want you to have that for security." Komp's sales from July until December, 1912, averaged about $650 per month. The amount of his purchases does not appear, but it is certain that there were during that time considerable quantities of new goods purchased and added to the stock, for the total amount of stock was not greatly reduced during that time. Among such goods were the goods of the plaintiff, for which the main action was brought.

The trial court found that the conditional sales agreement was valid, that the accounts were duly assigned to *Riehl* for value, that *Riehl* was not liable as garnishee, and dismissed the garnishment proceedings. From this judgment the plaintiff appeals.

For the appellant there was a brief by *Cady, Strehlow & Jaseph,* and oral argument by *L. D. Jaseph.*

Francis S. Bradford, for the respondent.

WINSLOW, C. J. In this case it is held:

1. So far as the rights of creditors are concerned, an agreement by which a stock of merchandise is transferred upon deferred payments, with the provision that the business shall be continued, the stock kept up by new purchases, and the vendor have the title of the entire stock, including the additions, as security for the purchase price, must be held to be in legal effect a chattel mortgage, notwithstanding the parties have called it an agreement of conditional sale; otherwise the provisions of sec. 2316*b*, Stats. 1911, might be nullified by the parties to every such transaction by simply calling the instrument an agreement of conditional sale.

2. No statement of the amount of sales made from the stock, the amount paid on the mortgage debt, and the valuation of the stock added, having ever been filed by the mort-

gagor in this case, as is required by sec. 2316*b*, Stats. 1911, to be done every sixty days from the date of the instrument, the lien of the mortgagee ceased as to creditors before the commencement of this action.

3. There was no valid assignment of the accounts in this case because the words relied upon were not words of present transfer, but merely words indicating an intention to make a transfer at some future time, and were unaccompanied by the delivery of the books or the accounts, or any other act indicating an intention to relinquish the control over the accounts or pass the title to the garnishee. *Chapman v. Plummer,* 36 Wis. 262.

By the Court.—Judgment reversed, and action remanded with directions to enter judgment against the garnishee in accordance with this opinion.

LIESNER and another, by next friend, Respondents, vs. WANIE, Appellant.

January 15—February 3, 1914.

Appeal: When "taken" within time limited: Wild animals: When become property.

1. Where, within the time limited by sec. 3039, Stats., notice of appeal was duly served as provided in sec. 3049 and a copy of the undertaking upon appeal was served on the adverse party, the appeal was "taken," within the meaning of said sec. 3039, although the undertaking was not filed with the clerk of the trial court within said time.
2. When a wild animal is brought under the control of a person so that actual possession is practically inevitable, a vested property interest in it accrues which cannot be divested by another's intervening and killing it.
3. Upon the evidence in an action to recover the body of a wolf a verdict for plaintiff was properly directed under the foregoing rule.

APPEAL from a judgment of the circuit court for Shawano county: JOHN GOODLAND, Circuit Judge. *Affirmed.*

Action to recover the body of a wolf said to have been mortally wounded by plaintiffs and reduced to possession thereafter by defendant. The evidence, as viewed by the trial court, was to this effect: Plaintiffs mortally wounded the wolf and had so followed up their attack on the animal as to substantially have it in their possession. They had it where and in such condition and circumstances that escape was improbable, if not impossible. Then defendant came upon the scene and interfered by delivering a shot which finally ended the animal's life. He took the body as his property and retained it to the damage of plaintiffs. The sum recoverable, in case of defendant being liable, was not in serious dispute. The court directed a verdict against him and judgment was rendered thereon.

The notice of appeal to this court, though served within the time provided by statute, was not filed with the clerk of the circuit court until some days after expiration of the two years following the date of the judgment.

P. J. Winter, for the appellant.

For the respondents the cause was submitted on the brief of *Eberlein & Eberlein.*

MARSHALL, J. Respondents' counsel suggest the question of whether jurisdiction of the cause here is wanting because of failure to take the appeal within the two years limited therefor by serving the proper notice on the clerk of the circuit court, together with a proper undertaking and also filing the same with such clerk within such time.

The language of the section relied on is this:

"The time within which a writ of error may be issued or an appeal taken to obtain a review by the supreme court of any judgment or order in any civil action or special proceeding in a court of record, is limited to two years from the date of the entry of such judgment or order." Sec. 3039, Stats. 1911.

It is significant that the period of limitation is subject to be interrupted by the *taking of an appeal.* Therefore, as an original proposition, if that event happened within the two years after the entry of judgment, jurisdiction was acquired for some purposes, though for the final one of hearing and determination, other things were required. *Harrigan v. Gilchrist,* 121 Wis. 127, 213, 99 N. W. 909.

It is conceded that the notice of appeal was properly served, or if not conceded we hold such to be the fact, within the limitation period, but neither such notice nor the undertaking was filed with the clerk of the circuit court until after such period. Is an appeal taken, within the meaning of the limitation statute, before being perfected so as to afford this court jurisdiction for all purposes, subject to the arrival here of the record?

It is significant that sec. 3049, Stats. 1911, treats of the taking of an appeal as one thing and perfection of it as another. This is the language:

"Any appeal shall be deemed taken by the service of a notice of appeal, and perfected on the service of the undertaking for costs," etc.

It should be said, in this connection, that the undertaking as well as the notice of appeal were duly served, within the limitation period, though not filed so as to require the clerk of the circuit court to transmit the record, until after its expiration.

From the significance attributable, reasonably, to the fact, as indicated, that the taking of an appeal is spoken of as one thing and perfecting of it as another, it might well be said that the language, "Any appeal shall be deemed taken" in sec. 3049, refers to the words of the limitation statute, "The time within which a writ of error may be issued or an appeal taken," rendering certain the point of time when the running of the period of limitation is to be deemed in-

terrupted. That is, that the language in sec. 3049 should be read as a proviso to sec. 3039, thus:

"The time within which . . . an appeal may be taken . . . is limited to two years from the date of the entry of such judgment or order;" provided, any appeal shall be deemed taken by the service of a notice of appeal. So, looking at the statute in its letter only, the serving of a notice of appeal stops the running of the statute, but the court has held that both the taking and perfecting of the appeal must occur to have that effect. *Yates v. Shepardson,* 37 Wis. 315; *Eaton v. Manitowoc Co.* 42 Wis. 317; *Munk v. Anderson,* 94 Wis. 27, 68 N. W. 407; *Haessly v. Secor,* 135 Wis. 548, 116 N. W. 175; *Ady v. Barnett,* 142 Wis. 18, 124 N. W. 1061. Whether the court would go that far now, since not required to by the letter of the statute, if it had to deal with the matter as an original proposition, may be doubted in view of the analysis of the statute and liberal construction thereof to preserve the appeal remedy in *Harrigan v. Gilchrist,* 121 Wis. 127, 99 N. W. 909.

There are expressions to be found, particularly in *Huebner v. Koebke,* 42 Wis. 319, indicating that the papers must actually be placed on file with the clerk of the circuit court to interrupt the running of the statute; but not in any case where the question was up for decision, nor in any such way as to indicate there was a considerate purpose to lay down a rule on the subject. It is considered, now, that the words of the statute, in their literal sense, except so far as heretofore firmly departed from, should be followed. So proceeding, the restrictive effect of the statute must be held not, in any event, to go further than to require perfecting of the appeal within the limitation period by service of the notice of appeal upon the adverse party and upon the clerk of the court in which the judgment or order appealed from was rendered, and service of a copy of the undertaking on the

adverse party. The rigorous character of the early decisions on this subject, has been very much softened in recent years, as particularly indicated in *Harrigan v. Gilchrist.* In *Ady v. Barnett, supra,* the court held that a vitally defective undertaking could be perfected even after the limitation period; thus dealing with the service of the notice of appeal as sufficient to give this court jurisdiction to take and retain the cause for final disposition, only waiting upon the due perfection of the appeal, evidenced by the record. It follows that the objection to jurisdiction must be overruled.

It is conceded that if the plaintiffs had substantially permanently deprived the wolf of his liberty,—had him so in their power that escape was highly improbable, if not impossible, before defendant appeared on the scene and with his gun pointed so as to reach within some three feet of the animal delivered a finishing shot, it had become the property of plaintiffs and was wrongfully appropriated by appellant. Such is according to the prevailing rule. The instant a wild animal is brought under the control of a person so that actual possession is practically inevitable, a vested property interest in it accrues which cannot be divested by another's intervening and killing it. Ingham, Law of Animals, 5. Such is the law of the chase by common-law principles, differing from the more ancient civil law which postponed the point of vested interest to that of actual taking.

The evidence in this case very strongly tends to establish all the facts requisite to ownership of the wolf by plaintiffs,—so strongly that all reasonable doubts in respect to the matter, if any would otherwise have remained, might well have been removed by the superior advantages which the trial court had. In the light of other evidence, all reasonable doubts may well have been removed as to who delivered the shot which so crippled the animal as to cause him to cease trying to escape, thus permitting appellant to substan-

tially reach it with the muzzle of his gun at the instant of delivery of the finishing shot. That, at such instant, the plaintiffs were in vigorous pursuit of the game, the evidence is clear, and that in a few moments, at most, they would have had actual possession, is quite as clear. So we must hold that the verdict was properly directed and the judgment properly rendered thereon.

By the Court.—The judgment is affirmed.

GLASS, Respondent, vs. ZACHOW and others, imp., Appellants.

January 16—February 3, 1914.

Mechanics' liens: Foreclosure: **Lis pendens:** ***Laches: Waiver of lien as to subsequent purchasers: Actions affecting title to land: Constructive notice: Filing of complaint.***

1. One claiming a mechanic's lien is bound to prosecute his foreclosure action in good faith and with reasonable diligence in order to preserve his lien against subsequent purchasers in good faith, for value, without notice of his claim.
2. An action to foreclose a mechanic's lien was commenced on December 7, 1908, about ten days before the end of the year limited therefor, but nothing further was done therein until May 8, 1909, when the summons and complaint were filed, and on December 2, 1910, a notice of *lis pendens* was filed. On May 3, 1909, the land was conveyed for full value to purchasers in good faith, without actual notice of plaintiff's claim, and they in turn, on September 20, 1909, sold to other purchasers in good faith, without notice, who also paid full value. *Held*, that by his laches in not promptly prosecuting his claim and filing notice of *lis pendens* plaintiff had waived his lien as to said purchasers.
3. The provision in sec. 3324, Stats., that the judgment in an action to foreclose a lien shall direct a sale of the interest of the owner or any interest which may have been acquired by any person claiming under him after the commencement of

the work or the furnishing of materials, does not prevent such a waiver.

4. The filing of the summons and complaint in an action affecting the title to real estate, without the filing of notice of *lis pendens* as provided in sec. 3187, Stats., is not constructive notice to subsequent purchasers or incumbrancers.

APPEAL from a judgment of the circuit court for Shawano county: JOHN GOODLAND, Circuit Judge. *Reversed.*

This action was brought against the defendants Addie Stark and Nick Stark to foreclose a mechanic's lien. The petition for lien was duly filed within the time prescribed by statute. The labor performed was in drilling a well upon the real estate of the defendants Addie Stark and Nick Stark and furnishing materials between November 1 and December 17, 1907, which amounted to $84. The action was commenced December 7, 1908, but the summons and complaint were not filed in the office of the clerk of the circuit court for Shawano county, the county in which the action was brought, until May 8, 1909, and no notice of *lis pendens* was filed until December 2, 1910. The defendants Addie Stark and Nick Stark did not appear in the action and remained in default. On the 3d day of May, 1909, and more than one year and four months after the last work was performed, the defendants Addie Stark and Nick Stark, by warranty deed, sold the premises in question to the defendants *W. C. Zachow* and *Mary Zachow,* who purchased the same for full value, in good faith, and the deed was recorded in the office of the register of deeds for Shawano county May 17, 1909. On September 20, 1909, the defendants *W. C. Zachow* and *Mary Zachow,* his wife, conveyed the premises to the defendant *Carl Feldt,* who also paid full value and purchased in good faith. It is admitted that neither the defendants *W. C. Zachow* or *Mary Zachow,* his wife, nor defendant *Carl Feldt* or *Wilhelmina Feldt,* his wife, had any knowledge that an action had been commenced to foreclose said lien until after conveyance to *W. C. Zachow,*

and that they purchased the premises in good faith without any actual knowledge of the foreclosure of said lien.

On September 26, 1911, the plaintiff amended his summons and complaint by making *W. C. Zachow* and *Mary Zachow,* his wife, and *Carl Feldt* and *Wilhelmina Feldt,* his wife, defendants, and said defendants appeared in the action, answered, and defended on the ground that they took the property discharged of any lien in favor of the plaintiff.

The case was tried upon stipulated facts which embraced the foregoing. The court ordered judgment on the stipulated facts to the effect that the plaintiff have a lien upon the premises in question, which lien take precedence over any claim of the defendants or any or either of them, and that the judgment be entered in the usual form, except that no judgment for deficiency be entered against the defendants *Zachow* and wife and *Feldt* and wife. Judgment was entered accordingly, from which this appeal was taken.

P. J. Winter, for the appellants.

For the respondent there was a brief by *Eberlein & Eberlein,* and oral argument by *M. G. Eberlein.*

Kerwin, J. The question involved is whether the plaintiff, by laches in failing to promptly prosecute his claim and file notice of *lis pendens,* waived his lien. The contention of the respondent is that, since the statute provides that the judgment shall adjudge the amount due and direct that the interest of the owner in the premises at the time of the commencement of the work or furnishing materials for which liens are given or which he or any person claiming under him has since acquired be sold to satisfy the amount of the lien, a special statutory lien is given, which cannot be affected or cut off by conveyance of the premises, and relies upon *Webster v. Pierce,* 108 Wis. 407, 83 N. W. 938, and *Hewett v. Currier,* 63 Wis. 386, 23 N. W. 884. But neither of these cases reaches the question here.

Conceding, without deciding, that the lien of the plaintiff could not be cut off by a conveyance after it had attached had the plaintiff promptly pursued his remedy and not slept upon his rights, we are of opinion that the laches of the plaintiff here amounted to a waiver of his lien as against subsequent purchasers in good faith, for value. So we need not consider cases holding that a mechanic's lien cannot be defeated by a conveyance of the property in cases where there has been no laches or conduct upon the part of the claimant amounting to a waiver of the lien. The plaintiff here filed his lien, and served a summons and complaint December 7, 1908, and did nothing further in the action until May 8, 1909, when the summons and complaint were filed, and afterwards and on December 2, 1910, filed a notice of *lis pendens*. In the meantime defendants *Zachow* and *Feldt* purchased the property in good faith, for value, and without actual notice of plaintiff's claim. The question arises, Did they have constructive notice? We think not. Although the summons and complaint were filed before *Feldt* bought, the filing did not constitute constructive notice, because of the statutory *lis pendens*. Sec. 3187, Stats. This section provides for filing notice of *lis pendens* in actions affecting the title to real estate, and makes such filing notice to a purchaser or incumbrancer of the property affected thereby. The statute, as regards subsequent purchasers and incumbrancers, supplements the common-law *lis pendens*, and to the extent that its filing is constructive notice to subsequent purchasers and incumbrancers it is exclusive, and the common-law *lis pendens* does not apply. *Brown v. Cohn*, 95 Wis. 90, 93, 69 N. W. 71; *Pennington v. Martin*, 146 Ind. 635, 45 N. E. 1111; Bennett, Lis Pendens, sec. 321; *Bensley v. Mountain Lake W. Co.* 13 Cal. 306, 73 Am. Dec. 575; *Corwin v. Bensley*, 43 Cal. 253; *Abadie v. Lobero*, 36 Cal. 390; *Jorgenson v. M. & St. L. R. Co.* 25 Minn. 206; 25 Cyc. 1466, 1467.

It follows, therefore, that the *Zachows* and *Feldts* had no constructive notice until the filing of the notice of *lis pendens,* which was after they purchased.

The plaintiff was bound to prosecute his case in good faith and with reasonable diligence in order to preserve his lien against subsequent purchasers in good faith, for value, without notice of the plaintiff's claim. *Hammond v. Paxton,* 58 Mich. 393, 25 N. W. 321; *Smith v. Shell Lake L. Co.* 68 Wis. 89, 31 N. W. 694. The plaintiff merely filed his lien, but did not file the summons or complaint or take any further action in the case until long after the expiration of the year during which the statute requires action to be commenced. This, we think, was such laches as amounted to a waiver of the lien as against subsequent purchasers in good faith, for value, without notice. 27 Cyc. 343. It was held in *Ehrman v. Kendrick,* 1 Met. (Ky.) 146, that failure for four years to prosecute to a decree will deprive the lien of its validity as against a subsequent mortgagee without notice.

In *Petree v. Bell,* 2 Bush, 58, it was held that a delay of nearly two years, without excuse or explanation, to prosecute an action was sufficient to deprive the plaintiff of the benefit of *lis pendens.*

In *Herrington v. McCollum,* 73 Ill. 476, it was held that a lien was discharged by lack of diligence to prosecute. At page 484 the court said:

"If to permit a case to remain off docket for two entire years, during four regular terms of court, without making any effort to reinstate it, and have a hearing, can be called the exercise of reasonable diligence, or, indeed, any degree of diligence whatever, it would be difficult to determine what might be regarded as laches in the prosecution of a suit."

The course pursued by plaintiff was well calculated to deceive purchasers of the property. The statute requires suit to be brought for foreclosure of mechanics' liens within

one year, obviously for the purpose of speeding the settlement and adjustment of such matters. The statute also provides easy means of protecting the lien claimant in case of delay in prosecuting a lien suit by filing a *lis pendens*. Had the summons, complaint, and notice of *lis pendens* been seasonably filed as provided by statute, and the suit prosecuted with diligence, all parties would have been protected and the lien of the plaintiff preserved. The fact that nothing appeared of record until long after the time for bringing suit to enforce the lien had expired and no *lis pendens* filed would naturally lead purchasers to believe that the claim for lien had been abandoned. It follows that the judgment of the court below must be reversed.

By the Court.—The judgment is reversed, and the cause remanded with instructions to dismiss the complaint as to defendants *W. C. Zachow, Mary Zachow, Carl Feldt,* and *Wilhelmina Feldt.*

WEISSMAN, Administratrix, Respondent, vs. WEISSMAN, Appellant.

January 16—February 3, 1914.

Gifts: Evidence: Witnesses: Competency: Transaction with person since deceased: Executors and administrators: Actions: Setoff.

1. In replevin against the father of plaintiff's deceased husband, the question being whether or not defendant gave the property in question to the deceased, plaintiff was not incompetent to testify that, when defendant brought the property to the farm on which she and her husband resided, he said he gave it to them and they could do what they liked with it—there being no showing that the deceased was present when that statement was made or that it was any part of any communication or transaction between the defendant and the deceased or between the witness and the deceased.
2. A creditor of a decedent cannot take possession of personal property of the estate after the death of the owner and then, in the consequent replevin action by the administrator, offset his demand against the deceased. Sec. 3847, Stats., does not apply to such a case.

APPEAL from a judgment of the circuit court for Shawano county: JOHN GOODLAND, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *Olen & Olen,* and oral argument by *O. L. Olen.*

P. J. Winter, for the respondent.

TIMLIN, J. This action of replevin is brought by the respondent as administratrix of the estate of her husband, William Weissman, deceased. She also avers that she is the sole heir of her deceased husband. The defendant, *Herman Weissman,* was the father of William Weissman and took possession of the personal property after the death of the latter. He denies the ownership of the respondent and pleads a counterclaim for $400 for rent due to him from deceased for a certain farm and for the personal property in question under an alleged oral leasing thereof by him to his son.

The first error assigned is upon the admission of the testimony of the plaintiff, said to be incompetent to testify to transactions or communications with her deceased husband. "*Q.* At the time *Herman Weissman* brought this personal property over to the farm, what if anything did he say about who should be the owner of that personal property?" Objection, etc.; to which the court answered: "There is no transaction with a deceased person so far." Objection overruled. The witness, speaking through interpreter, testified: "He said he gave all the property to them and they could do what they liked with it." The court seemed to doubt the competency of the witness to testify to this. Counsel for plaintiff stated that it was merely the admission made by the defendant; whereupon the objection was overruled. It is contended that the plaintiff was more than a mere bystander, that she was the wife of the deceased and participated in the transaction by receiving an interest in the gift. Although the plaintiff claimed title under or through the deceased it was not shown that the decedent was present at the time this

admission was made or that the admission was part of any communication or transaction between the defendant and the deceased or between witness and deceased. Counsel should have brought out the fact, if it was a fact, that the decedent was present, or that the alleged admissions were part of a communication or transaction between defendant and deceased. This he neglected to do.

Testimony of several other witnesses not parties or otherwise incompetent was received relative to admissions of the defendant to the effect that he had given the property in question to his son, and defendant's counsel on cross-examination succeeded in bringing out additional evidence tending to show a gift which would have been incompetent had it been offered by the other side and objected to. It is said that the defendant was not permitted to rebut this testimony of plaintiff, but we do not find this borne out by the record.

When the defendant took the stand as a witness it was attempted to be shown by him that he did not give the personal property in question to his deceased son, and upon objection this testimony was properly excluded. There was no question that the alleged donee was in possession either as donee or lessee. One of the defendant's sons testified that he was present at a conversation between the defendant and plaintiff's decedent in which there was made an oral agreement that the decedent should rent from defendant a farm and this personal property for a term of two years at $200 per year, and there was some other evidence tending to establish that agreement. The court instructed the jury to disregard the counterclaim. The cause of action for replevin arose after the death of plaintiff's decedent. The counterclaim did not arise out of the same transaction nor was it in the nature of a mutual claim. Sec. 3847, Stats., relates to a different class of cases. To permit a creditor of decedent to capture personal property of the estate after the death of the owner and then offset his demand against deceased in the

consequent replevin by the administrator, would tend to defeat the *pro rata* distribution of estates among creditors of the decedent and would not come within the statutes relative to counterclaims or setoffs. Cases like *Collins v. Morrison,* 91 Wis. 324, 64 N. W. 1000, are distinguishable. The demand for rent existing against the decedent should have been filed as a claim in the county court and there was no error in rejecting the counterclaim in this action, which ruling was in legal effect a nonsuit.

We find no errors in the instructions of sufficient gravity to call for reversal, and upon the main issue the case seems to turn upon a question of fact resolved by the jury against the appellant.

By the Court.—Judgment affirmed.

GRUBBE, Respondent, vs. PIERCE, imp., Appellant.

January 16—February 3, 1914.

Partnership: Acceptance of note of one partner for firm debt: Discharge of other partners: Contracts: Consideration: Waiver of claim: Questions for jury.

1. Where a creditor accepts an evidence of indebtedness from one of two persons jointly liable and informs the debtor who gives such evidence that he accepts him for the debt, a jury may reasonably draw the inference that the creditor intends to release the other debtor.
2. Where a due-bill or note of one partner for the amount of a firm debt is accepted by the creditor, and the latter at the same time expressly agrees to accept such partner alone for the debt, such acceptance and agreement make a valid contract which operates to discharge the other partner or partners.
3. Even if it should be conceded that such an agreement is not supported by any valid consideration, yet if it was made by the creditor with full knowledge of the facts it may be found that he thereby waived his claim against the other partners, especially where there are equitable considerations which might well have induced him to do so.

Grubbe v. Pierce, 156 Wis. 29.

APPEAL from a judgment of the circuit court for Outagamie county: JOHN GOODLAND, Circuit Judge. *Reversed.*

For the appellant there was a brief by *Francis S. Bradford,* attorney, and *E. T. Fairchild,* of counsel, and oral argument by *Mr. Bradford.*

Julius P. Frank, for the respondent.

BARNES, J. The defendants were copartners doing business at Appleton under the firm name of Lahay & Company. Their business consisted of taking orders for $16 suits of clothes made by the International Tailoring Company of Chicago. The plaintiff was the agent of the Wells Fargo Express Company at Appleton. The defendant *Pierce* lived in Milwaukee and took no active part in the management of the business. He first directed that the clothes be shipped on open account to the firm, but, learning that Lahay was not paying the bills as he should, undertook to protect himself by directing the shipments to be made by express, C. O. D., and they were so made. *Grubbe,* without *Pierce's* knowledge or consent, and against the rules of his employer, delivered goods to the amount of $418 to Lahay without collecting the amount called for on delivery of the goods. He was required by the express company to make good this sum, and sues both partners to recover his loss. The court directed a verdict in plaintiff's favor. *Grubbe* was advised by Lahay that *Pierce* was a partner in the business and was responsible, but testified that he did not know whether he was so informed before or after the credit was furnished. He also testified that before the credit was extended he knew that *Pierce* was in the firm.

On July 25, 1912, *Grubbe* took a due-bill signed by W. F. Lahay for the amount of the account. Later he took a note signed by Lahay for the amount due and attempted to negotiate it. He was asked if he took the note in settlement of the indebtedness, and replied: "No, sir, I took it as an ac-

commodation note to pay the account." He also testified that he did not take Lahay for the amount of the bills, but took Lahay & Company. One Steidl, who had been employed in defendants' store, testified that *Grubbe* wanted to learn Lahay's address because he thought Lahay was honest and he might get $20 or $25 on account from him from time to time. Lahay testified that plaintiff accepted a due-bill signed by him individually for the amount of the claim and agreed to take him (Lahay) for the amount of the debt. The note was destroyed and it does not appear when it became due.

Under this testimony a jury might find that plaintiff accepted the due-bill and note of Lahay for the amount of the debt with the understanding and agreement that *Pierce* should be released. Where a creditor accepts an evidence of indebtedness from one of two persons jointly liable and informs the debtor who gives such evidence that he accepts him for the debt, the inference may reasonably be drawn that the creditor intends to release the other debtor. It was for the jury to draw such inference in this case, if the alleged agreement was valid.

The briefs on file give us no assistance on the most difficult question in the case. Numerous authorities hold that where a creditor accepts the note or obligation of a third person under an agreement to discharge one primarily liable, the agreement is valid. *Challoner v. Boyington,* 83 Wis. 399, 53 N. W. 694; *Willow River L. Co. v. Luger F. Co.* 102 Wis. 636, 78 N. W. 762; *Davenport v. Schram,* 9 Wis. 119; *Allis v. Meadow Spring D. Co.* 67 Wis. 16, 29 N. W. 543, 30 N. W. 300; *First Nat. Bank v. Case,* 63 Wis. 504, 22 N. W. 833.

There are authorities which hold that the taking by a creditor of a note or obligation of one partner under an agreement to discharge a copartner jointly liable does not preclude the creditor from proceeding against all the part-

ners to collect the debt. It is said that the party giving the obligation is simply agreeing to pay his own debt and that the creditor receives no benefit from the promise made by him to release one of his debtors, and therefore it is *nudum pactum*. *Cole v. Sackett,* 1 Hill (N. Y.) 516; *Waydell v. Luer,* 5 Hill (N. Y.) 448; *Frentress v. Markle,* 2 G. Greene (Iowa) 553; *Early v. Burt,* 68 Iowa, 716, 28 N. W. 35; *Walstrom v. Hopkins,* 103 Pa. St. 118; *Morrison v. Kendall,* 6 Ind. App. 212, 33 N. E. 370.

The preponderance of authority is, however, to the contrary. The English cases hold that the taking of a note or obligation of one partner for a partnership debt, coupled with an agreement to accept the same as a payment and to discharge the other parties liable for the debt, does in fact discharge them. *Thompson v. Percival,* 5 B. & Ad. 925; *Lyth v. Ault,* 7 Exch. 669. These cases hold that the transaction constitutes an accord and satisfaction.

Chief Justice MARSHALL, in speaking of the discharge of one of two joint debtors in the manner above specified, says:

"The note of one of the parties, or of a third person, may, by agreement, be received in payment. The doctrine of *nudum pactum* does not apply to such a case; for a man may, if such be his will, discharge his debtor without any consideration. But, if it did apply, there may be inducements to take a note from one partner liquidating and evidencing a claim on a firm which might be a sufficient consideration for discharging the firm." *Sheehy v. Mandeville,* 6 Cranch, 253, 264.

The following cases hold directly or inferentially that where the note or obligation of one partner is tendered to and accepted by the creditor and the latter agrees to look to such partner alone for his debt, the remaining partner or partners are discharged: *Collyer v. Moulton,* 9 R. I. 90; *Motley v. Wickoff,* 113 Mich. 231, 71 N. W. 520; *Harris v. Lindsay,* 4 Wash. C. C. 271; *Wadhams v. Page,* 6 Wash. 103, 32 Pac. 1068; *First Nat. Bank v. Cheney,* 114 Ala.

536, 21 South. 1002; *Hoopes v. McCan*, 19 La. Ann. 201; *Lewis v. Davidson's Ex'r*, 39 Tex. 660; *Burdett v. Greer*, 63 W. Va. 515, 60 S. E. 497. Other cases which lean in the same direction, but which were decided on somewhat different facts, are: *Venable v. Stevens*, 94 Ga. 281, 21 S. E. 516; *Hellman v. Schwartz*, 44 Ill. App. 84; *Rusk v. Gray*, 83 Ind. 589; *Stone v. Chamberlin*, 20 Ga. 259; *Frye v. Phillips*, 46 Wash. 190, 89 Pac. 559.

There seems to be but one case decided in this court which involves the question under consideration. *Hœflinger v. Wells*, 47 Wis. 628, 3 N. W. 589. In this case it is held that, where the individual note of one partner is taken for a loan made to a firm, the presumption is that it was not taken in payment. In the opinion it is said:

"And if the jury or the court should find as a fact that the money was borrowed by and loaned to the firm, and upon its credit, then the taking of the individual note of one member of the firm would not be a payment of such firm debt, unless it was affirmatively shown that such note was taken in payment of the same."

The case of *Sheehy v. Mandeville, supra,* is cited to the proposition quoted, and the court evidently intended to follow Chief Justice MARSHALL'S decision and hold that such an agreement as we are considering would not be *nudum pactum.*

Considering what our own court has said upon the subject and the authorities elsewhere, we think it should be held that if plaintiff accepted a due-bill or note from Lahay for the amount of the firm debt, agreeing expressly at the same time to accept Lahay solely for the debt, such acceptance and agreement made a valid contract which operated to discharge *Pierce.*

If it should be conceded that there was no valid consideration to support such an agreement, we still think the question of whether or not such an arrangement had been made should

have been submitted to the jury. Surely the plaintiff had the right to waive his claim against *Pierce*. There are some equitable considerations which might well induce him to do so. *Pierce* had tried to protect himself against the very thing that happened, by directing the goods to be shipped C. O. D., and it was only because plaintiff failed to do what *Pierce* had a perfect right to assume he would do that *Pierce* became liable. Some of our cases have defined a waiver to be an intentional relinquishment of a known right. *Monroe W. W. Co. v. Monroe,* 110 Wis. 11, 22, 85 N. W. 685; *Swedish Am. Nat. Bank v. Koebernick,* 136 Wis. 473, 479, 117 N. W. 1020; *Dunn v. Superior,* 148 Wis. 636, 645, 135 N. W. 145. Other cases have gone still farther, but for present purposes the cases cited go far enough. If it should be found that plaintiff made the agreement claimed with full knowledge of the facts, it might also be found that he waived his claim against *Pierce*. *Consaulus v. McConihe,* 2 N. Y. Supp. 89, and 119 N. Y. 652.

By the Court.—Judgment reversed, and cause remanded for a new trial.

C. W. BEGGS, SONS & COMPANY, Respondent, vs. ESTATE OF BEHREND, Appellant.

January 16—February 3, 1914.

Executors and administrators: Accounting: Claim against administratrix allowed against estate: Appeal: Harmless errors.

1. Where an administratrix continued the business of her decedent and in so doing bought goods which were necessary for the preservation of the estate, she was entitled to reimbursement in her final settlement.
2. Although in such case the indebtedness for the goods was one due from the administratrix and not from the estate, the allowance of the vendor's claim when filed against the estate

was not a prejudicial error, where the administratrix was also the sole heir, the estate was solvent, and all parties interested were before the court.

3. Violations of established rules or methods of procedure become material on appeal only when it is evident that they have impaired a party's right to a fair and impartial trial on the merits.

APPEAL from a judgment of the circuit court for Outagamie county: JOHN GOODLAND, Circuit Judge. *Affirmed.*

In 1910 C. W. Behrend died intestate and letters of administration were granted to his widow, who was his sole heir. Deceased in his lifetime was engaged in the retail drug business, and after his death and pending the settlement of the estate the administratrix continued the business and, through her agent in charge of the same, bought a bill of goods from plaintiff amounting to $332, for which it filed a claim against the estate. The county court allowed the claim and, upon appeal to the circuit court, the judgment of the county court was affirmed, and the defendant appealed.

For the appellant there was a brief by *Krugmeier & Heinemann,* and oral argument by *F. V. Heinemann.*

Francis S. Bradford, for the respondent.

VINJE, J. The trial court found that the goods bought were necessary for the preservation of the estate, and the finding is sustained by evidence. Such being the fact, the administratrix was entitled to reimbursement from the estate for the amount of the bill in her final settlement with it.

Appellant correctly contends that the indebtedness was one due plaintiff from the administratrix and not from the estate, and that this claim was not properly filed against the estate. *McLaughlin v. Winner,* 63 Wis. 120, 23 N. W. 402; *Miller v. Tracy,* 86 Wis. 330, 56 N. W. 866; *Brown v. McGee's Estate,* 117 Wis. 389, 94 N. W. 363; *Ferguson v. Woods,* 124 Wis. 544, 102 N. W. 1094. But since the county court had jurisdiction both of the settlement of claims

against the estate and of the allowance of expenses of administration, it was a mere irregularity to allow the latter under the former; especially was this so since the administratrix was the sole heir and the estate was solvent. All parties interested were before both the county court and the circuit court and had ample opportunity to be heard on the merits. So the error has not affected the substantial right of any party and the judgment must be affirmed. Sec. 3072*m*, Stats. 1913; *Crawley v. American Soc.* 153 Wis. 13, 139 N. W. 734. Violations of established rules or methods of procedure become material on appeal only when it is evident that they have impaired a party's right to a fair and impartial trial on the merits. The Code and the court alike require the brushing aside of all errors that do not affect substantial rights.

By the Court.—Judgment affirmed.

EVANS, Appellant, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Respondent.

January 16—February 3, 1914.

Railroads: Killing of stallions on track: Contributory negligence: Question for jury: Evidence: Competency.

1. In an action to recover for two stallions which had escaped to the highway and thence to defendant's right of way, where they were struck by a train, the evidence of contributory negligence is *held* sufficient to take that question to the jury, in view of the fact that the safe keeping of stallions requires the use of more than ordinary care.
2. In such action, the plaintiff having testified that he did not allow his horses to run at large on the highway, it was competent to show that they had been frequently seen on the highway before the accident, for the purpose of proving a breachy habit.

APPEAL from a judgment of the circuit court for Shawano county: JOHN GOODLAND, Circuit Judge. *Affirmed.*

Action to recover for two young stallions which escaped on to the highway and from the highway on to the defendant's right of way over a defective cattle-guard, and were there struck by a train. The evidence showed that the stallions for about three weeks before the accident were pastured on a farm owned by plaintiff and operated by a tenant, situated a little over a mile from the railroad crossing; that the field was fenced with an ordinary wire fence and had a wooden gate four boards high opening on the highway; that the stallions escaped from the pasture by breaking down the gate during the night; that they had escaped in the same manner the previous night and that no precautions had been taken to prevent a second escape, except to patch up the gate with boards; that their absence from the pasture was first discovered at 6 o'clock in the morning and no search instituted for them until three hours later; and that they had been frequently seen at large on the highway during the summer before the accident. The plaintiff himself testified that the horses had gotten out two or three times during the three weeks they were on the farm prior to the accident.

A special verdict having been returned by the jury, in which all the questions were answered in the plaintiff's favor, except the question as to the plaintiff's contributory negligence, which was answered in defendant's favor, the judgment was rendered for the defendant, and the plaintiff appeals.

The cause was submitted for the appellant on the brief of *Dillett & Larson,* and for the respondent on that of *Edward M. Smart.*

WINSLOW, C. J. In this case it is held:

1. There was sufficient evidence to take the question of contributory negligence to the jury in view of the fact that

a stallion is an animal whose safe keeping requires the use of more than ordinary care. Sec. 1482, Stats. 1913.

2. The plaintiff having testified that he did not allow his horses to run at large on the highway, it was competent to show that they had been frequently seen on the highway before the accident, for the purpose of proving a breachy habit.

By the Court.—Judgment affirmed.

MILLS and wife, Respondents, vs. MORRIS, imp., Appellant.

January 16—February 3, 1914.

Cancellation of instruments: Purchase-money mortgage: Fraud: Failure of title: Defenses: When cause of action accrues: Contracts: Rescission in part: Equity: Appeal: Harmless errors.

1. In an action to cancel a note and a purchase-money mortgage because of the failure of title to a part of the mortgaged lands which plaintiffs had purchased relying upon fraudulent representations by the mortgagee and defendant as to the death of the real heir thereto, such fraud having been established, the exclusion of evidence as to the true consideration for the note and mortgage was unimportant because, regardless of what the consideration was, it was not a defense.
2. If plaintiffs, having no knowledge that the real heir was alive, were induced to purchase the land in question by fraudulent representations of the vendor and defendant that such heir was dead or at least had not been heard from for ten years, the mere fact that they would not purchase without some reduction being made in the price as security against the remote chance of the heir being alive, would not prevent them from rescinding the sale because of such fraud.
3. There having been an absolute failure of title to the land as to which rescission was sought, the grantee was not required to wait until actually dispossessed before instituting such action.
4. The doctrine that one cannot affirm in part a contract or transaction tainted with fraud, and maintain an action for rescission as to the other part, is not without exceptions. The rule is equitable and ceases to operate where equity requires that it do so.

5. One may retain the benefit of a contract or transaction and yet sue for damages on account of a breach affecting it in part, or may affirm in part and rescind in part, obtaining a proportionate rebate in the purchase price, where some such course is necessary to conserve the real right of the matter.
6. Two tracts of land were conveyed by warranty deed to plaintiffs. The grantor was not the rightful owner of one of them, but had by false testimony as to the death of the real heir obtained a decree of the county court assigning it to her, and by similar false representations induced plaintiffs to purchase it with the other tract; and for a part of the whole purchase money about equal to the value of the tract which she did not own they gave to her a mortgage on both tracts. Afterwards the grantor died, having in the meantime transferred the mortgage to defendant, who had assisted in making the sale and had participated in the fraud. *Held*, that when the real heir appeared and claimed the tract rightfully belonging to him plaintiffs could, upon offering to surrender that tract to him, maintain an action to rescind the sale as to that tract and to cancel the mortgage as a cloud upon the title to the other tract.

APPEAL from a judgment of the municipal court of Outagamie county: THOMAS H. RYAN, Judge. *Affirmed.*

Action to cancel the record of a mortgage, a $2,200 note on the ground of fraud and to declare the same and the note given therewith void.

Charles S. Spaulding, in the town of Maine, Outagamie county, Wisconsin, in 1904, died intestate, possessed of title to lands covered by the mortgage sought to be canceled. He left surviving, his widow, Icybinda Spaulding, who was a second wife and defendant Hiram A. Spaulding, a son by a former marriage. Mr. Spaulding had not seen his son for many years. Administration of his estate was, in due form, and time, granted to the widow, she representing that the stepson had not been heard of for some ten years. In due course she filed her final account and secured a final order, in form, continuing title in her to said lands. Such order was entered upon her representations that Hiram was last heard from in British Columbia, some ten years theretofore;

that her deceased husband neither saw nor heard from his son but once after the latter's boyhood, that being by letter which was answered, and that the general belief was that he was dead since no one, so far as known, had seen or heard from him in over ten years. The final order was duly recorded in the office of the register of deeds of Outagamie county, Wisconsin. Hiram was then thirty-nine years of age, had been married some ten years, and was the father of several children, photographs of which were in possession of Mrs. Spaulding before her death, if not before she made the representations aforesaid. All the facts stated were as well known to defendant *Addie Morris,* who was a sister of Mrs. Spaulding, as to the latter. Mrs. Spaulding owned a tract of land adjoining that in question, both of which tracts were occupied by her as a home and were so occupied in the lifetime of her husband. February 28, 1910, she sold both tracts and conveyed the same by deed with full covenants to plaintiffs; the consideration being $3,700, $1,500 being paid at the time of the transfer and payment of the balance being evidenced by the note and secured on the land by the mortgage in question. The mortgage was duly recorded. Three thousand seven hundred dollars was the reasonable value of all the land and $2,200 of the tract which Mrs. Spaulding obtained through her deceased husband. She, in the transaction with plaintiffs, acted wholly through *Mrs. Morris,* who represented in the negotiations, that Mr. Spaulding's son was adjudged in the county court proceedings aforesaid to be dead; that Mrs. Spaulding had and could convey a good title. Plaintiffs, in making the purchase, relied on such representations and the order of the county court. October 6, 1910, Mrs. Spaulding assigned the note and mortgage to *Mrs. Morris* in consideration of $1 and other good and valuable considerations. Mrs. Spaulding had other property but it all came to the possession and under the control of her sister *Addie.* Thereafter Mrs. Spaulding died, intestate. No con-

sideration was in fact given by *Mrs. Morris* for the note and mortgage. When she took the assignment she knew all the facts affecting the title to the land covered by it and was as guilty as Mrs. Spaulding as regards making false representations respecting the existence of Hiram. She was not a *bona fide* purchaser of the note and mortgage. Plaintiffs' title to the Charles S. Spaulding land wholly failed by reason of it appearing that such land belonged to Hiram. They have been damaged thereby in the sum of $2,200. Before the commencement of this action Hiram appeared and demanded possession of his land. The total damage to plaintiffs by the failure of the title is $2,494.80.

On such findings it was held that, as matter of law, Hiram Spaulding was the owner of the land covered by the mortgage, free from any incumbrance created thereby, notwithstanding the order of the county court giving Mrs. Spaulding the appearance of having come into a good title thereto; that a fraud was committed on Hiram Spaulding and upon plaintiffs in which Mrs. Spaulding and *Mrs. Morris* were participants; that the note and mortgage are void and should be canceled.

Judgment was rendered accordingly.

The cause was submitted for the appellant on the brief of *Humphrey Pierce,* and for the respondents upon that of *John Bottensek.*

MARSHALL, J. This case does not seem to present any difficulty warranting extended treatment. It cannot well be contended, and is not, that the facts found do not support the judgment. The point made that some material findings are not supported by the evidence, is ruled to the contrary by the familiar principle giving efficiency to trial determinations of issues of fact where there is a fair basis in the evidence therefor.

The point made that the court improperly excluded evi-

dence respecting the true consideration for the note and mortgage is unimportant because, regardless of what the consideration was, it is not a defense to the case made showing that Mrs. Spaulding and *Addie Morris* colluded together to save the land for the former, knowing that it belonged to Hiram.

The point made that the price of the land, when conveyed to respondents, was reduced some $300 because of the remote chance of Hiram being alive and appearing upon the scene to claim his rights, is likewise unimportant. Respondents, in any event, had no knowledge of the existence of Hiram. and were led, by Mrs. Spaulding, through her representatives, and doubtless by her connivance or consent, to believe that Hiram was dead, or at least had not been heard from for more than ten years, which they knew was false. The fact that, in face of representations which might well have created in the mind of an ordinary careful person the impression that Hiram was dead,—plaintiffs would not accept a conveyance with full covenants without some reduction of the purchase price of the land as security against the remote chance of Hiram having been alive at the time of the death of his father, plainly shows that the sale, even with the small rebate in price, was accomplished by false pretenses which, according to the findings, *Addie Morris* was just as guilty of as Mrs. Spaulding, if not more so.

There having been an absolute failure of title to the lands, plaintiffs were not required to wait until dispossessed before seeking a remedy to prevent the wrong to them becoming remediless.

The doctrine that one cannot affirm in part and bring an action for rescission in part, but must treat the tainted contract as an entirety, upon which appellant's counsel relies, citing *Grant v. Law,* 29 Wis. 99, is familiar. It is good in its place. It has several exceptions which are not mentioned or recognized in *Grant v. Law.* So, though the case was

rightly decided, the opinion is rather misleading, as clearly shown in *Ludington v. Patton,* 111 Wis. 208, 86 N. W. 571.

Though, in general, one may not affirm in part and rescind in part, the rule is equitable and ceases to operate where equity requires it to do so, as indicated in *Gay v. D. M. Osborne & Co.* 102 Wis. 641, 78 N. W. 1079; *Ludington v. Patton, supra,* and other cases. One must distinguish between situations where equity requires the rule to apply and where it requires an exception; and also between an action for rescission and one based on rescission; also between an action for rescission and an action to prevent injury where rescission would not furnish an adequate remedy. One may retain the benefit of a contract and sue for damages because of a breach affecting it in part (*McConnell v. Hughes,* 83 Wis. 25, 53 N. W. 149), or affirm in part and rescind in part, obtaining a proportionate rebate in the purchase price, where some such course is necessary to conserve the real right of the matter. *Gay v. D. M. Osborne & Co., supra.* The court there said:

"The right of rescission of a contract for fraud, though a legal right, is based on equitable principles. Therefore the requisites of its exercise should go no further than strict compliance with the dictates of good conscience requires. For that reason the exception to the rule of total rescission indicated has become a part of our jurisprudence."

A proper conception of the real ethics of the law will enable one to perceive that rules are based on principles of justice and are limited by the effects in that regard. Therefore, when it is said that application of a rule to a particular situation would work injustice instead of justice, especially where the controversy is being dealt with in equity, wisdom will lead one to search for some recognized exception to fit the case and, if none of the particular character can be found illustrated, to classify the circumstances within the broad

principle that rules based on supposed necessities of justice are not to be applied beyond their reasonable scope.

It seems clear in the circumstances of this case, that respondents had no way of adequately protecting themselves except by an action to cancel the note and mortgage. Nothing was received from *Addie Morris,* therefore there was nothing to return to her. Willingness to do equity was shown, in that readiness was exhibited to surrender the land to the true owner. No surrender to Mrs. Spaulding was possible because she was dead. The only thing open to respondents, under the circumstances, was to treat the conveyance as to the particular land as void, and appeal to equity to prevent the happening of irreparable injury to respondents. The only adequate way of preventing such injury was by an action to remove the cloud created by the mortgage on the land, obtained by good title, to cancel the mortgage in fact and of record and to effectually prevent transfer of the note to some innocent party by requiring delivery thereof into court for cancellation.

The foregoing covers all matters suggested by counsel for appellant which are deemed worthy of mention.

By the Court.—The judgment is affirmed.

MAAS, Respondent, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant.

January 16—February 3, 1914.

Evidence: Competency: Value of second-hand property: Opinion evidence not binding: Appeal: Reversal: Option to take judgment for smaller sum.

1. In an action to recover the value of a second-hand feed mill which was lost by a carrier in transit and which had no specific market value, plaintiff having introduced opinion evidence as to its value, it was competent for defendant to show what the mill was bought for about the time of shipment.

2. Opinion evidence as to the value of property which has no specific market value is not binding upon the jury, and they may find a lower or a higher value than the undisputed opinion evidence shows.
3. In an action to recover the value of property which was admittedly lost by a carrier, the amount involved being small, this court, upon reversing a judgment for plaintiff, gives him an option to take judgment for the value placed upon the property by the defendant.

APPEAL from a judgment of the circuit court for Shawano county: JOHN GOODLAND, Circuit Judge. *Reversed.*

This action was brought to recover the value of a feed mill delivered to the defendant for carriage and which was lost in transit. The only issue in the case was the amount of damages. The court after the evidence was in directed a verdict for the plaintiff for $50. Judgment was entered for plaintiff on the verdict and the defendant appealed.

Edward M. Smart, for the appellant.

For the respondent the cause was submitted on the brief of *Eberlein & Eberlein.*

KERWIN, J. Error is assigned (a) in the exclusion of evidence as to price of the feed mill; (b) in admission of opinion evidence; (c) in directing a verdict for plaintiff.

1. Regarding the first assignment of error it appears that the feed mill was a second-hand mill, and the plaintiff introduced opinion evidence as to its value. Defendant attempted to show on cross-examination and otherwise that the mill was bought about the time of shipment for $15. The evidence was excluded. This was error. The property not having a specific market value and the plaintiff having put in opinion evidence of value, it was competent for defendant to show what the property was purchased for about the time of shipment. *Conklin v. Hawthorn,* 29 Wis. 476; *Watson v. M. & M. R. Co.* 57 Wis. 332, 15 N. W. 468; *Uniacke v. C., M. & St. P. R. Co.* 67 Wis. 108, 29 N. W. 899; *Allen v. C. & N. W. R. Co.* 145 Wis. 263, 129 N. W. 1094; *Wells v. Kelsey,*

37 N. Y. 143; *Schacht v. Oriental S. & T. Co.* 155 Wis. 121, 143 N. W. 1058.

2. The second and third assignments of error may be considered together. The court directed a verdict on the opinion evidence of several witnesses who testified to the value of the property, placing it from $50 to $100. The court directed a verdict for $50, the lowest value placed upon the feed mill by any witness. Obviously the theory of the court below was that the jury was bound by this opinion evidence, therefore that the plaintiff was entitled to at least $50 damages. The opinion evidence was not binding upon the jury. They were at liberty under it to find a lower or higher value than the undisputed evidence showed. Such evidence is not conclusive on the jury. *Moore v. Ellis,* 89 Wis. 108, 61 N. W. 291; *Head v. Hargrave,* 105 U. S. 45; *The Conqueror,* 166 U. S. 110, 17 Sup. Ct. 510. The record shows that the defendant placed the value of the feed mill at $15 and offered to make such proof, which proof the court ruled out.

It is to be regretted that a case of such small magnitude cannot be finally disposed of on this appeal, but we are forced to the conclusion upon well established principles of law that the errors complained of were prejudicial, therefore we cannot affirm the judgment.

It is deemed advisable in view of the small amount involved that further litigation be avoided as far as possible. We have therefore concluded to give the plaintiff the option to take judgment for $15, the value placed upon the feed mill by defendant, and in case such option be not accepted that a new trial be ordered.

By the Court.—The judgment of the court below is reversed, and the cause remanded with instructions that if plaintiff within twenty days from notice of filing *remittitur* serve and file a consent in writing to take judgment for $15, with costs, judgment be so entered; otherwise a new trial is granted.

CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant, vs. RAILROAD COMMISSION OF WISCONSIN, Respondent.

January 16—February 3, 1914.

Railroad commission: Fixing freight rates, etc.: Refund of excessive charges: Review of orders: Burden of proof: Proceedings before commission: Evidence as to reasonable rates: Expert knowledge of commission: Comparison of rates: Cost of service: Reports of railroad companies: Judicial notice: Reports of employees of commission: Presumption in favor of its orders.

1. Upon complaint that a rate or charge exacted by a railway company for any service is unreasonable and exorbitant, the railroad commission may in one proceeding fix and order substituted, under sec. 1797—12, Stats., a rate or charge which they find to be reasonable, and also, under sec. 1797—37*m*, find what would have been a reasonable rate for the service in question and award a refund of excessive charges paid.
2. An order of the railroad commission under sec. 1797—37*m*, Stats., finding what would have been a reasonable rate or charge and directing a refund, may be reviewed in an action brought under sec. 1797—16, which authorizes an action to vacate and set aside "any order of the commission fixing any rate or rates, fares, charges," etc.
3. In a proceeding under sec. 1797—37*m*, Stats., it is not required as a condition of relief that the rate or charge be both erroneous, illegal, unusual, and exorbitant. If it comes within either of those descriptive words, the commission should find what in its judgment would have been a reasonable rate or charge for the service in question.
4. Every rate or charge which is not reasonable and just under sec. 1797—3, Stats., may be found to be erroneous or illegal under sec. 1797—37*m*.
5. The railroad commission, in fixing rates under the statute, is not required to proceed with the strict formalities which obtain in courts of law or equity, and although the statute contemplates a hearing and the taking of evidence in such cases, there is a large amount of acquired expert knowledge which the commission may apply to facts in evidence in reaching its determination.
6. In an action in the circuit court to review an order of the railroad commission fixing rates of transportation, the burden rests upon the plaintiff to show by clear and satisfactory evidence that the order complained of is unlawful or unreasonable.

7. What are just and reasonable railroad rates is a question akin to questions of the reasonable value of services or the reasonable value of property which has no fixed market value. In the investigation of such questions great latitude of evidence is necessarily permitted, and one of the recognized bases of opinion or judgment in such matters is the price paid or charged for other similar services or property. Although the value of such evidence necessarily varies according to the circumstances, a rate made thereon cannot be set aside as unsupported by evidence.
8. Another basis for computing a reasonable rate is the cost of the service to the carrier, aided and supplemented by a comparison with what it costs other roads to perform like services; and upon this question the statistical evidence supplied by the annual reports of railroad companies to the state board of assessments and to the railroad commission, and the freight tariffs filed by the railroad companies with the commission, together with the decisions of the commission showing methods of computing cost from the details contained in such reports, constitute a sufficient basis, more accurate and thorough than the ordinary statistical bases, for a computation of the cost to a railroad of any particular service.
9. All such reports, tariffs, and decisions being public records, they need not be formally offered in evidence before the railroad commission or certified up to the circuit court in every action brought to review an order of the commission, in order that they may be considered, but the commission and the court may take judicial notice of their contents, and both parties are at liberty to present computations therefrom in argument at any stage of the litigation, even in the supreme court.
[10. Whether or not the railroad commission has the right to use and consider reports made to it by persons employed by the commission under sub. (b) of sec. 1797—18, without offering them in evidence, not decided.]
11. If consulting such reports would be error on the part of the commission, the statutory presumption in favor of its orders would require the appellant therefrom to prove that reports mentioned in its opinion had reference to reports of this character.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *Edward M. Smart,*

C. C. Wright, and *C. A. Vilas,* attorneys, and *Edward M. Hyzer,* of counsel, and oral argument by *Mr. Smart* and *Mr. Wright.* They contended, *inter alia,* that it appeared from the findings of the court, as well as from the record of the hearing before the *Commission,* that the *Commission* considered, in addition to the evidence introduced, its own knowledge and facts ascertained by its own investigations but not introduced in evidence or made a part of the records. Such a method of fixing rates violates the constitutional requirement of "due process of law" and that justice be administered "conformably to law." *Interstate Comm. Comm. v. L. & N. R. Co.* 227 U. S. 88, 33 Sup. Ct. 185; *Interstate Comm. Comm. v. U. P. R. Co.* 222 U. S. 541, 32 Sup. Ct. 108; *Southern Pac. Co. v. Interstate Comm. Comm.* 219 U. S. 433, 31 Sup. Ct. 288; *Minneapolis, St. P. & S. S. M. R. Co. v. Railroad Commission,* 136 Wis. 146, 116 N. W. 905; *State ex rel. Milwaukee Med. Coll. v. Chittenden,* 127 Wis. 468, 107 N. W. 500; *Ekern v. McGovern,* 154 Wis. 157, 142 N. W. 595.

A brief was also filed on behalf of the Minneapolis, St. Paul & Sault Ste. Marie and Chicago, Milwaukee & St. Paul Railway Companies, signed by *Sanborn & Blake,* attorneys, and by *Alfred H. Bright* and *Kenneth Taylor,* counsel for the former company, and by *Burton Hanson, O. W. Dynes,* and *J. N. Davis,* counsel for the latter; and the cause was argued orally by *John B. Sanborn.* Upon the same point they cited the following additional cases: *Louisville & N. R. Co. v. Garrett* (U. S.) 34 Sup. Ct. 48; *People ex rel. McAleer v. French,* 119 N. Y. 502, 23 N. E. 1061; *Union L. Co. v. Railroad Commission,* 144 Wis. 523, 129 N. W. 605; *Interstate Comm. Comm. v. N. P. R. Co.* 216 U. S. 538, 30 Sup. Ct. 417; *Interstate Comm. Comm. v. D., L. & W. R. Co.* 220 U. S. 235, 31 Sup. Ct. 392; *U. S. v. B. & O. S. W. R. Co.* 226 U. S. 14, 33 Sup. Ct. 5; *Sabre v. Rutland R. Co.* 86 Vt. 347, 85 Atl. 693; *Chicago, M. & St. P. R. Co. v. Minnesota,* 134

U. S. 418, 10 Sup. Ct. 702; *Ex parte Young,* 209 U. S. 123, 28 Sup. Ct. 441; *Mo. Pac. R. Co. v. Tucker,* 230 U. S. 340, 33 Sup. Ct. 961; *State ex rel. Great Northern R. Co. v. Railroad Commission,* 60 Wash. 218, 110 Pac. 1075; *Washington ex rel. Oregon R. & N. Co. v. Fairchild,* 224 U. S. 510, 32 Sup. Ct. 535.

The *Attorney General* and *Walter Drew,* deputy attorney general, for the respondent, argued, among other things, that the Railroad Commission Law does not require or contemplate that, in forming its decision and making its order, the *Commission* shall confine itself to consideration of the evidence produced upon its hearing in the case. The express provisions of the statute providing for and defining the court review of orders of the *Commission* clearly deny jurisdiction to the circuit court to set aside orders of the *Commission* upon the ground that the *Commission* has considered evidence other than that produced upon the hearing before the *Commission.* Neither constitutional limitations nor requirements of natural justice necessitate a construction of the Railroad Commission Law limiting the *Commission* in its ascertaining of the reasonable and lawful rate to consideration of the evidence taken upon its hearing. The *Commission* is not established as an inferior court whose actions are governed by the rules of evidence and procedure applicable to courts and made subject to review as those of an inferior court for errors in procedure. It is an investigating body, administrative in character, and its orders are not judgments or orders preliminary to judgments as the orders of a court, but, in the language of this court, "mere administrative rulings,"—mere provisional findings, in no respect conclusive or binding as affecting any substantive right.

If the *Commission's* orders, *i. e.* the duties or burdens which they prescribe, are right, are reasonable and lawful, they become expressive in the particular case of the legislative command. If they are wrong, if the rates named are

unreasonable or if they invade property rights, they can do no injury because the statute provides that action may be brought in the circuit court to vacate and render them null and void in such a case, and because upon such an action there may be a full trial upon the merits and upon the weight of the evidence, according in all respects to the "dissatisfied" party every essential of due process of law and of natural justice. Thus, the aggrieved party is fully secured in all his constitutional rights against being deprived of his property without due process of law or the taking of his property without just compensation and is assured equal protection of the laws, and all this quite regardless of the proceedings before the *Commission*. Nor are any constitutional rights of the appellant invaded by the provisions of the statute governing the action in the circuit court placing the burden of proof upon the plaintiff, defining the degree of proof required, or making the *Commission's* order *prima facie* evidence of its own validity. 8 Cyc. 924–926, and cases cited in notes; 10 Cent. Dig. tit. Constitutional Law, §§ 260–262; *Delaplaine v. Cook*, 7 Wis. 44, 54; *Plumer v. Marathon Co.* 46 Wis. 163, 179, 50 N. W. 416; *Will of McNaughton*, 138 Wis. 179, 188–190, 118 N. W. 997, 120 N. W. 288; *Borgnis v. Falk Co.* 147 Wis. 327, 352, 353, 133 N. W. 209.

TIMLIN, J. The appellant commenced this action against the respondent as authorized by sec. 1797—16, Stats., to review an order of the respondent *Commission* bearing date November 23, 1912, requiring appellant to establish a rate of 1.7 cents per 100 pounds for the transportation of ice from Silver Springs, Wisconsin, to Milwaukee, Wisconsin, instead of the rate of two cents per 100 pounds theretofore existing, and awarding plaintiff reparation upon all shipments moved between said points from January 16, 1911, to September 30, 1911, at the rate of three tenths of one cent for each 100 pounds transported.

The statute provides for a review of the orders of the *Railroad Commission* by action against such *Commission* instead of by appeal or writ. This is somewhat analogous to the ancient writ of error, the issue of which was considered for many purposes to be the institution of a new action to review the proceedings of the subordinate tribunal. But the questions presented by this action and the scope of review therein are matters wholly regulated by statute. The *Commission* is authorized by sec. 1797—12, upon complaint of any person that the rates are in any respect unreasonable or unjustly discriminatory, to notify the railroad complained of that such complaint has been made, and ten days' notice of the time and place when and where such matters will be considered and determined must be given to the railroad, and the parties to the controversy are entitled to be heard and entitled to process to enforce the attendance of witnesses. If upon such investigation the rate complained of shall be found to be unreasonable or unjustly discriminatory, the *Commission* is given power to make an order substituting therefor such rate as it shall have determined to be just and reasonable and which shall be charged, imposed, and followed in the future. It also has power to make such orders respecting such regulation, practice, or service as it shall have determined to be reasonable. The *Commission* may also proceed on its own initiative and make a preliminary investigation in order to ascertain whether sufficient grounds exist to warrant a hearing being ordered. Having determined this in the affirmative, notice is given to the railroad setting forth the rate investigated and fixing a time and place for a hearing on such rate. Notice may also be given in such case to other parties in interest. The railroad itself may also be complainant before the *Commission* with like effect as though the complaint were made by any other person.

The Railroad Rate Commission Act of this state has a number of features distinguishing it from the federal Interstate

Commerce Commission Act as originally adopted, and from the rate commission laws of some of the other states. Prominent among these distinguishing features are the initiative on the part of the *Commission,* the duty to find a fixed and definite point at which the rate will be reasonable, thus permitting the raising as well as the lowering of rates, also the provisions for review in the courts of the order of the *Railroad Commission,* thus giving the carrier its "day in court" before the *Commission* and also before the circuit court.

By sec. 1797—37*m* the *Commission* is, in addition to the ordinary power to fix rates, also given the power, upon the complaint of any person aggrieved that a rate or charge exacted is erroneous, illegal, unusual, or exorbitant, to hear this complaint and decide upon the merits thereof in the manner provided by sec. 1797—12; that is, upon notice and hearing. If the rate or charge made is found to be erroneous, illegal, unusual, or exorbitant, the *Commission* shall find what in its judgment *would have been* a reasonable rate or charge for the service complained of. If this reasonable rate is less than the amount exacted, the carrier shall have the right to refund to the person making such charges the amount so found to be excessive. For very obvious reasons the *Commission* is not given power to enforce this refund. Its power of decision is only *quasi*-judicial. But the party aggrieved may, after the findings of the *Commission,* maintain an action in the courts to recover the amount of such excessive charge as found by the *Commission,* and in the trial of this action the findings of the *Commission* are declared to be *prima facie* evidence of the truth of the facts found by it.

The proceeding in question was apparently taken by the *Commission* under the authority of secs. 1797—12 to 1797—37*m,* and no objection is made and none can be made to this joinder in one proceeding. The statutory action against the *Commission* for review authorized by sec. 1797—16 is one to vacate and set aside any order of the *Commission* fixing

any rate or rates, fares, charges, classifications, joint rate or rates, or any order fixing any regulations, practices, or service. This action must be based on the ground that the rate, etc., fixed in such order is unlawful or that the regulation, etc., fixed in such order is unreasonable. No review of the order for a refund made under sec. 1797—37*m* is expressly provided for in such action, unless the order finding that a rate or charge is erroneous, illegal, unusual, or exorbitant, and finding what would have been a reasonable rate or charge, is included in the words of sec. 1797—16, "fixing any rate or rates, fares, charges, classifications, joint rate or rates, or any order fixing any regulations, practices or service." Considering the remedial nature of sec. 1797—16, the quoted words last above may be taken to include the "would have been" finding required by sec. 1797—37*m*. The original complaint in this action did not seek to review that part of the order in question fixing rates for future traffic. The prayer of the complaint was "that a judgment be entered herein setting aside and holding for naught the order of said *Commission* (in so far as the same pertains to reparation) and for such other and further relief as to the court may seem just." There was no averment in the body of the complaint to the effect that the rate fixed in such order is unlawful or that any regulation, practice, or service fixed in such order is unreasonable. Sec. 1797—16. Instead of this, it was averred that the order "was unauthorized and contrary to law for the reason that no evidence was presented by the complainant upon which such an order could be predicated; that the findings of fact made by the *Commission* are without authority or within the jurisdiction of said *Commission*." "That the record upon which the *Commission* made its alleged findings of fact contained no evidence that the rates charged for the transportation of ice were exorbitant, unusual, illegal, or erroneous, and in fact found that said rate of two cents per hundred pounds, which rate was collected, was a 'little

higher than petitioner should be required to pay.'" "That under and by virtue of the statutes in such case made and provided said *Railroad Commission* is without authority to grant reparation unless it is found that the rate charged is exorbitant, unusual, illegal, or erroneous, and that, having no evidence upon which to base a finding required by law, said *Commission* exceeded its authority and was without jurisdiction to enter an order granting reparation." The appellant by leave of court on the trial amended its complaint, striking out the words "in so far as the same pertains to reparation," thus making the action an attack upon the order both as to rates and refund.

It is not required that the rate or charge be both erroneous, illegal, unusual, and exorbitant, but if it comes within either of these descriptive words the *Commission* shall find what in its judgment *would have been* a reasonable rate or charge for the service complained of. Every rate or charge which is not reasonable and just under sec. 1797—3 may be found to be erroneous or illegal under sec. 1797—37*m*. Hence there is nothing in the complaint which shows absence of jurisdiction on the part of the *Commission* to make the order complained of, unless it be an entire absence of evidence to support the findings or order of the *Commission*, or resting the order upon evidence taken in the absence of and without notice to the appellant. Doubtless the *Commission* is not required to proceed in this as in other respects with the strict formalities which obtain in courts of common-law and equity jurisdiction. But the statute contemplates a hearing and the taking of evidence in the matter of fixing rates. This is apparent from sec. 1797—12, which provides for notice and hearing, for the attendance of witnesses; of sec. 1797—13, which provides for administering oaths, issuing subpœnas, requiring production of documentary evidence, taking depositions, presence of a stenographer who is to make a transcript in long hand of the evidence and proceedings; and sub. (b)

of sec. 1797—16, providing that if, upon review in court, evidence shall be introduced by the plaintiff different from or additional to that offered at the hearing before the *Commission,* the court shall proceed as there directed. Nevertheless from the administrative nature of the tribunal, the requirements of expert knowledge, the nature of the duties required, and the subjects considered, there must be a very considerable number of duties which the *Commission* is authorized to perform without the formality of trial or hearing or the formal taking of evidence. This is true of all administrative tribunals. There is also a vast amount of acquired expert knowledge which the *Commission* may apply to facts in evidence, as, for illustration, when the number of tons hauled and the distance hauled and the whole cost is given, what part of it usually and ordinarily represents terminal expenses; the usual proportion of terminal expenses to miles hauled; the usual and ordinary ratio of distribution of freight charges according to the value of the product carried; what allowance or increase is usually and ordinarily made for size or bulk proportionate to weight; the average number of tons carried in a car; the ordinary proportion of empty to loaded cars; the ordinary consumption of fuel per train mile or per ton mile or per passenger, and many other items of information which, while more difficult and complicated, are yet of the same nature as the expert knowledge of a farmer with reference to the number of acres which should constitute a day's plowing; a merchant with respect to the usual percentage of cost of packing and delivery; a sailor with reference to the usual number of miles which should be made in a given time and in a given direction with a given direction and velocity of wind. None of these estimates are mathematically accurate, but long practice in making estimates of that kind makes one an expert.

No evidence was offered in the circuit court, except that the plaintiff offered a certified copy of the proceedings be-

fore the *Commission,* including the testimony taken. From this evidence it appeared that the commodity in question was ice of an inferior quality, the market value thereof, the distance hauled, the kind of cars used, the weight carried in a car, the distance carried (seven miles), the manner of loading and the disposition of the cars and cargo at the point of destination, the profit of the shipper, the shrinkage in the ice and the rates charged for transportation of this commodity by rail for different distances, in a great many instances in the same locality and in other localities on this road and on other railroads. These distances were not uniform, none of them the same distance over which complainant's ice was shipped, and the railroad hauls varied from about twelve to sixty miles. There was also in evidence the former charge of the appellant for moving ice between the same points, which was something less than that fixed by the *Commission,* and it was shown, or at least testified to, that prior to 1905 the rate between the termini in question for ice of the kind in question was 1.5 cents per 100 pounds. Had neither party offered any evidence in the circuit court the order in question must have been affirmed (sub. (c), sec. 1797—16), and upon the plaintiff rests the burden of showing by clear and satisfactory evidence that the order complained of is unlawful or unreasonable. This is no great hardship on the railroad company, for it is in possession of all the evidence in its books and papers or in public records necessary for this purpose.

What are just and reasonable rates is a question akin to questions of the reasonable value of services or the reasonable value of property which has no fixed market value. In the investigations of such questions great latitude of evidence is necessarily permitted, and one of the recognized bases of opinion or judgment in such matters is a comparison with the price paid or charged for other similar services or property. *Stolze v. Manitowoc T. Co.* 100 Wis. 208, 75 N. W. 987; *Milwaukee & M. R. Co. v. Eble,* 3 Pin. 334. See cases collected

in 17 Cyc. 108, 109, 110; 16 Cyc. 1133 to 1145. Considering a similar question in the case of *Interstate Comm. Comm. v. L. & N. R. Co.* 227 U. S. 88, 33 Sup. Ct. 185, the court said:

"The commission considered evidence and made findings relating to rates which the carrier insists had been compelled by competition, and were not a proper standard by which to measure those here involved. The value of such evidence necessarily varies according to the circumstances, but the weight to be given it is peculiarly for the body experienced in such matters and familiar with the complexities, intricacies, and history of rate-making in each section of the country. So, too, the fact that a commodity rate is low may cast some light on the reasonableness of the higher rate on the class from which that commodity was taken or to which it might legally be restored. It is true that the old low locals, Mobile (west) to New Orleans, were maintained, while those from New Orleans (east) to Mobile were raised, is not conclusive against the reasonableness of new tariff put in force in 1907. But it was a fact tending to support the conclusion unless the difference was shown to have been warranted by proper rate-making. Of the sufficiency of the explanation, including the extent of the difference in empty car movement, the commission was authorized to judge. It also had before it the company's financial statement and general tariff sheets."

It was accordingly there held that a rate made upon such facts was not unsupported by evidence. Where there is no fixed market value, this method of ascertaining the value, the *quantum valebant,* by comparison with other similar things in which the element of value is known, or is better known, is primitive, old, and well established. It is subject to many infirmities and uncertainties like all attempts to explain or establish that illusive mental concept represented by the word "value" or that represented by the word "reasonable." The rates with which we compare may be themselves too low or high, or the analogy may be imperfect and there may be only an apparent but no real similarity to the case in hand. But

nevertheless the comparison tends to inform the mind and guide the judgment, it narrows the subjective estimate of value which can never be wholly eliminated, and it is frequently the only external or objective guide. In legal inquiries it cannot be disregarded merely because not syllogistically or mathematically accurate. It tends to establish probability or improbability, as the case may be, and more than this, it is indispensable in questions of unlawful discrimination in rates. There was, therefore, as shown by the certified copy in evidence, testimony before the *Commission* upon which it had a legal right to rely in fixing what *is* as well as what *would have been* a reasonable rate.

But the principal contention of appellant is that the order of the *Commission* fixing the rates and declaring the complainant entitled to reparation or refund was made in part upon evidence not produced before the *Commission* at the hearing nor brought to the attention of the appellant, hence that due process of law was denied to the appellant within the rule of the case last cited. The findings and order of the *Commission* are made at the foot of an opinion in which the *Commission,* after the manner of courts, sets forth in apparent explanation or justification of its decision the grounds upon which the same rests. The appellant points to the following sentences as indicating that the *Commission* considered such extraneous evidence:

"But in this as in most cases, the principal basis for computing the reasonable rate is the cost of the service to the carrier, and this cost has been ascertained in the present case by the methods often explained in decisions of this *Commission.* Considering the fact that the commodity involved is of comparatively low value in proportion to its weight, is transported in regular movements and is subject to little risk in transit, and considering also the rather heavy loading of ice and the fact that no extra equipment of any kind is necessary in handling it, it is apparent that this commodity is entitled to a comparatively low rate. While the rate must necessarily

be sufficient to cover the actual expense of the service, the traffic is of a kind that should not be expected to contribute as much in the way of interest upon the railway company's investment as does the average traffic on the line. An application of the principles just stated to the circumstances of this case seems to warrant the conclusion that the present rate of two cents per 100 pounds is a little higher than the petitioner should be required to pay. At the same time, the cost figures at hand do not at this time justify the *Commission* in fixing the rate as low as 1.5 per 100 pounds, the figure at which it was placed by the railway company up to about 1905. When the movement and terminal expenses of the railway company upon this traffic are properly adjusted to take account of the length of the haul and the other conditions peculiar to this traffic, it is found that a rate of 1.7 cents per 100 pounds is about fair as between the shipper and the carrier, and the establishment of such rate will be ordered."

This falls very short of saying that the *Commission* acted without evidence or acted upon evidence of extrinsic facts or circumstances not legally before the *Commission* at the hearing. On the contrary, the statement is that the *cost figures were at hand,* and one of the bases, in fact the principal basis, for computing a reasonable rate was the cost of the service to the carrier, which cost had been ascertained *by methods* often explained in decisions of the *Commission.* Decisions here referred to are public records entitled to judicial notice (sec. 1797—37*n*) and are doubtless *Buell v. C., M. & St. P. R. Co.* 1 Wis. R. R. Comm. Rep. 324 (see pp. 340 *et seq.*); *Pulp & Paper Mfrs. v. C. & N. W. R. Co.* 2 Wis. R. R. Comm. Rep. 168; *Ringle v. C., M. & St. P. R. Co.* 7 Wis. R. R. Comm. Rep. 170. These show the complexity of the questions investigated, the methods of arriving at cost, and the bases of computation.

The railroad companies are required to report annually to the state board of assessments and in considerable detail (sec. 1215—5, Stats.), and this report constitutes a public docu-

ment or record. In addition to this, all railroads are required to report in great detail to the *Railroad Commission* upon blanks prepared and sent out by said *Commission* (secs. 1797—18 to 1797—21), and these reports are made annually and comprise a volume of about 125 quarto pages each, are on file with the *Commission,* and constitute public records or documents. Of the same character is the freight tariff made and filed by each railroad company. These annual reports contain all the necessary data from which the cost of transportation per ton mile or per train mile and the apportionment of terminal expenses may be computed with as much accuracy as it is possible to compute such cost. Space will not permit the elaboration of this report, but it may be said that for the entire system and for Wisconsin, separately, the total passenger revenue and the total freight revenue are separately stated. In like manner the total operating expenses and the account to which each class of items of this expense is chargeable is also set forth. The number of tons of freight earning revenue, carried, the number of tons carried one mile, and the number of tons carried per mile of road, and the average haul are given, the average amount of receipts for each ton of freight and the average receipts per ton mile and per mile of road, the number of employees engaged in each kind of occupation and the wages of each group, the switching and terminal expenses, the different commodities carried and the tons of each and the percentage which each forms of the whole tonnage carried, and many other data. These reports and the tariffs of freight rates filed by the several railroad companies constitute a sufficient basis more accurate and thorough than the ordinary statistical bases for a statistical computation of the cost to the railroad of any particular service such as that in question here. It is, of course, characteristic of all statistical computations that they deal with class-frequencies, ratios, and averages, and that slight errors may exist in the bases without materially affecting the result. In this

case if there is any error in the bases it was made by the appellant itself, for the *Commission* had before it defendant's report covering the period in question. In such case the actual average cost of the same kind of service may also be arrived at by the comparative method from like reports of other railroads performing the like service. The method of ascertaining what is a reasonable rate by a computation of the cost of service is here aided and supplemented by a comparison with what it costs other roads to perform like services. We do not think it necessary that these public documents be formally offered in evidence before the *Railroad Commission* or certified up to the circuit court in every action brought to review an order of the *Commission*. All parties know of their existence, the appellant itself furnished a report covering the period in question, the cost of the services in question was a fact peculiarly within the knowledge of the appellant if within the knowledge of any person, and the statute justly throws the burden of proof upon the appellant in the matter of showing that the rate fixed by the *Commission* is unreasonable. The *Commission* and the court may take judicial notice of the contents of these public records, and both parties are at liberty to present computations therefrom in argument at any stage of the litigation, even in this court.

With reference to judicial notice see *Paquete Habana,* 175 U. S. 677, 20 Sup. Ct. 290; *Caha v. U. S.* 152 U. S. 211, 222, 14 Sup. Ct. 513, and cases cited; *New York Indians v. U. S.* 170 U. S. 1, 18 Sup. Ct. 531; *Knight v. U. S. L. Asso.* 142 U. S. 161, 12 Sup. Ct. 258; *Gardner v. The Collector,* 6 Wall. 499; *State v. Swift,* 69 Ind. 505; *Larson v. First Nat. Bank,* 66 Neb. 595, 92 N. W. 729; *Central of Ga. R. Co. v. Butler M. & G. Co.* 8 Ga. App. 1, 68 S. E. 775; *Gordon, R. & Co. v. Tweedy,* 74 Ala. 232; *Scheffler v. M. & St. L. R. Co.* 32 Minn. 518, 21 N. W. 711; *McHenry v. Yokum,* 27 Ill. 160. It is urged by the appellant that the words in the decision of the *Commission* above referred to must be taken

to relate to reports of persons employed by the *Commission* under sub. (b) of sec. 1797—18, and the learned attorney general argues in support of the power of the *Commission* to use those reports without offering them in evidence. We do not find it necessary to decide this point and leave that question until it necessarily arises in a case, without expressing any opinion thereon. They certainly may use these for some purposes. It would be rather illogical, however, to presume that the *Commission* referred to these fragmentary and disconnected reports for the purpose of ascertaining cost of service when it had before it in official records a complete statistical basis for such computation in which many of the essential factors of distribution, average, and computation are made and verified by the appellant itself. The statutory presumptions in favor of the order of the *Commission* would require the appellant to prove that the opinion of the *Commission* refers to these reports of employees, if consulting such reports would constitute error, a proposition we are by no means disposed to admit. No such proof was made. The cost of the service is, of course, an important factor in fixing rates. What is a reasonable rate cannot be thus established with mathematical accuracy; the cost under one management may be less than under another. It must be prorated relatively, and the article carried and the risk of carriage and other factors must be considered. It includes the proportion of the overhead or fixed expenses chargeable to such service as well as the disbursements for wages, fuel, wear and tear, and other items. It requires statistical skill and experience to properly apportion to any commodity its proportion of the cost of the service, as the cases cited from the reports of the *Commission* amply show. But this item of evidence of what is a reasonable rate is much more effective to narrow the field of mere subjective valuation than the unaided comparative method. Although the cost method does not altogether exclude subjective considerations, it is, as was said in the opin-

ion of the *Commission,* the principal basis for computing a reasonable rate and recommends itself to those who are seeking for a more just and accurate basis of rate-making. The evidential bases for the application of this method are more certain and are always before the tribunal, and are the proper subjects of judicial notice when embodied in a public record or document. So that the *Commission* had before it the testimony of witnesses tending to prove what would be a reasonable rate by the comparative method of ascertaining that fact. All this testimony was certified to the circuit court. At the same time the *Commission* had before it these annual reports of the appellant and other railroad companies and their freight tariffs, of which judicial notice is taken, and these documents contain plenary evidence from which the cost of service in question could be computed with that inexact but substantial verity characteristic of statistical computations when properly made.

It must be held that the ruling of the *Commission* was based in the instant case on these two kinds of evidence, analyzed and illuminated by the expert knowledge and experience of the *Commission* members, and on nothing else.

By the Court.—The judgment of the circuit court is affirmed.

BARNES, J., took no part.

MARSHALL, J. The court is content to dispose of this case upon the ground that the *Railroad Commission* had before it, including what it might properly have taken judicial notice of, evidence supporting its decision. My opinion enables me to concur, subject to further study, when my brethren shall see fit to take up and decide the more important questions which the parties came here to have answered.

I think, as said upon another occasion,—*Income Tax Cases,* 148 Wis. 456, 134 N. W. 673, 135 N. W. 164,—that

in cases where all the people of the state are deeply interested in having a judicial determination of serious disputes affecting their welfare, and all are actually or in effect represented at the bar of the court and appealing to it for such determination, and it has ample jurisdiction to do so,—there should be no effort to minimize the scope of the response; but rather effort to make it as broad as the limits of the controversy in all its aspects. Why dispose of such a case upon one point and leave others, and perhaps, as here, the most important ones, undecided; making further judicial hearings necessary before those having to do with the great business activities of the state can know just what their rights are? Long periods of uncertainty respecting the law are harmful beyond measure.

I think the old method of deciding as little as actually necessary to the particular case, so that litigants must needs resort, again and again, to the court in order to settle an entire controversy, should be laid aside, especially in these cases having to do with the validity and scope of new and rather novel legislation. The court—instead of proceeding with that overcaution, as it seems to me though sanctioned by precedent—which increases judicial and professional labor in the end, gives rise to false ideas of the cause therefor, prolongs uncertainty, and saps private and public resources—should grapple with an entire controversy with all its major and material germane features, and rest from its labor only by the rendition of a broad, fully rounded out, efficient judgment in such cases of great public importance as this. The need therefor is such that this court should wash its hands as completely as practicable of even appearance of needless delay in giving such tribunals as the *Railroad Commission* and the parties who have to deal therewith all the aid which the judicial function enables it to give.

I appreciate that my associates are just as anxious as I am to deal as fully with matters presented here for decision

as is judicious in cases as they arise, but there is, at times, a difference in inclination to break away from the ancient method of reaching a conclusion for the case without deciding any more of the controverted questions involved than necessary.

The overshadowing matter of difference which led to this litigation,—the one which has, doubtless, particularly vexed the *Railroad Commission* and the parties required to appear before it, ever since the system of regulation administered by such a commission was created,—is whether the rights of parties can jurisdictionally and constitutionally be determined by it without all the essentials of a common-law hearing,—the incidents of reasonable notice and opportunity to be present, knowledge of the matter to be investigated, reasonable opportunity to produce witnesses, knowledge of all the adverse evidence to be considered, and opportunity to oppose it with evidence. Does the *Commission* exceed its jurisdiction and so incapacitate itself from rendering a valid decision by grounding its action on evidence gathered, *ex parte,* by its employees or its own members and not known to the contestants? Must it proceed in the manner indicated as jurisdictionally requisite in *Ekern v. McGovern,* 154 Wis. 157, 142 N. W. 595, and as is generally required of a *quasi*-judicial tribunal, keeping and preserving a record of all the evidentiary bases of its decision, so that it may be attacked directly for jurisdictional error, or impeached collaterally as void for such error? I would meet these questions now and solve all uncertainties, once for all, so far as this court could accomplish that much desired result. I may well repeat, in effect, what I said in the *Income Tax Cases.* The field untouched by the decision was as fully covered by eminent counsel as it is liable to ever be, all interests call loudly for its chosen instrumentality for such work to grapple with that now presented with urgent appeal for the task to be performed. While it is according to precedent to minimize the

judicial response to the actual necessities of the particular situation, I would cast aside the hindrances to real judicial progress and judicial efficiency, where the court has competency in that regard. I think progress along that line would go far to obviate seeming faults in the law and the common impatience with the law's delays.

From what I have here said, I appreciate that my concurrence with the result reached by the court rests largely on my apprehension that the *Railroad Commission,* in administering the legislative system for public utility regulation, is not fenced about by the common requirements of hearings by *quasi*-judicial tribunals, except in so far as they have been wrought into the written law; but I forego discussion of the subject, preferring to let such discussion wait upon some future occasion therefor.

The following opinion was filed March 11, 1914:

WINSLOW, C. J. (*concurring*). I am in entire accord with the opinion of the court, and I add this brief memorandum simply to emphasize my approval of the scope of the decision. We have had many new laws covering many new and untried fields of legislation spread upon our statute books during the last few years. By these laws business operations of the greatest importance, involving the most complicated public and private rights, are to be controlled and regulated by new methods and by new tribunals. The ordinary finite mind is not wise enough to look ahead and unerringly apprehend in advance the precise effect of all the provisions of this new legislation, and lay down rules of construction which shall infallibly operate to produce the desired results. That which appears beforehand to be an entirely reasonable and unobjectionable rule may afterward, in the light of actual experience, be demonstrated to be unwise and even absurd. The course of wisdom under such circumstances is to pro-

ceed with caution. The experienced navigator does not order "full steam ahead" when proceeding along a new and uncharted coast. I am not aware that either the people of the state or the administrative boards have had reason to complain in the past of any hesitancy or unwillingness on the part of this court to meet and solve the great public questions which have been submitted to it, nor do I think there is any such cause now. In the present case it was not claimed, nor was it the fact, that any methods were used by the *Commission* in reaching their conclusion other than those approved in the opinion of the court. When it shall appear that other methods have been used and those methods are challenged as illegal, the accompanying circumstances will also appear which have been deemed to make the use of such methods essential, and in the light of those circumstances the question will be approached with far better prospect of reaching a wise and workable result. Meanwhile the work of the *Railroad Commission* will doubtless proceed as it has in the past. If the arms of that body have been in any respect palsied by uncertainty as to their powers, I have not observed the fact.

CITY OF MILWAUKEE, Appellant, vs. ALTHOFF, by guardian, and another, Respondents.

January 17—February 3, 1914.

Master and servant: When relation exists: Hours of employment: Injury when walking to place of work: Workmen's Compensation Act: Municipal corporations: Liability to city employee: Defective sidewalk.

1. **The relation of master and servant may extend beyond the hours the servant is actually required to labor, and in some instances to places other than the premises where the servant is employed.**

2. When a city employee reported to his foreman, received his instructions for the day, and proceeded to carry out such instructions by starting for the place where he was to work, the relation of master and servant commenced, and in walking to the place of work he was "performing service growing out of and incidental to his employment," within the meaning of sec. 2394—4, Stats. 1911.
3. Where at a time when he is "performing service growing out of and incidental to his employment," a city employee is injured by reason of a defective sidewalk, the liability provided for by the Workmen's Compensation Act is in lieu of any other liability whatsoever, and his remedy against the city is under that section and not under sec. 1339, Stats.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

The appeal is from a judgment affirming an award of $2,138.11 made in favor of *Minnie Althoff* by the *Industrial Commission* under the Workmen's Compensation Act against the city of *Milwaukee* on account of the death of William A. Althoff, the father of said *Minnie Althoff*.

The deceased was employed by the city at an agreed compensation of $2 per day. His hours of labor were fixed at eight hours a day by an ordinance of the city, and he began work at 8 o'clock in the morning and finished at 5 in the afternoon. He was required to report to his foreman at 7:30 o'clock each morning to receive instructions as to where he was to work during the day, so that he might reach his place of employment at 8 o'clock. He reported according to custom on the morning of May 3, 1912, and, after receiving instructions as to where he was to work, proceeded toward the place. While on his way he fell on a sidewalk and injured his knee. He died on September 21, 1912, and it was found on sufficient evidence that his death was due to the injury which he received when he fell.

For the appellant there was a brief by *Daniel W. Hoan*, city attorney, and *William H. Timlin, Jr.*, first assistant city attorney, and oral argument by *Mr. Timlin*. They cited *Ben-*

son v. Lancashire & Y. R. Co. [1904] 1 K. B. 242, 6 Workm. Comp. Cas. 20; *Jackson v. General S. F. Co.* [1909] App. Cas. 523, 2 Butterworth's Workm. Comp. Cas. 56; *Gilmour v. Dorman, L. & Co.* 105 L. T. Rep. 54, 4 Butterworth's Workm. Comp. Cas. 279; *Walters v. Staveley C. & I. Co.* 131 L. T. 103; *Anderson v. Fife C. Co.* 47 Scot. Law Rep. 3, 5, 3 Butterworth's Workm. Comp. Cas. 539; *Perry v. Anglo-American D. Co.* 3 Butterworth's Workm. Comp. Cas. 310; *Kane v. Merry,* 48 Scot. Law Rep. 430, 4 Butterworth's Workm. Comp. Cas. 379; *Whitehead v. Reader,* 3 Workm. Comp. Cas. 40; *Kerr v. Wm. Baird & Co.* 48 Scot. Law Rep. 646, 4 Butterworth's Workm. Comp. Cas. 397; *M'Daid v. Steel,* 48 Scot. Law Rep. 765, 4 Butterworth's Workm. Comp. Cas. 412; *Traynor v. Robert Addie & Sons,* 48 Scot. Law Rep. 820, 4 Butterworth's Workm. Comp. Cas. 357; *Barnes v. Nunnery C. Co.* 4 Butterworth's Workm. Comp. Cas. 43; *Jenkinson v. Harrison, A. & Co.* 4 Butterworth's Workm. Comp. Cas. 194; *Lowe v. Pearson,* 79 L. T. Rep. 654, 1 Workm. Comp. Cas. 5; *Conway v. Pumpherston Oil Co.* 48 Scot. Law Rep. 632, 4 Butterworth's Workm. Comp. Cas. 392; *Harding v. Brynddu C. Co.* [1911] 2 K. B. 747, 4 Butterworth's Workm. Comp. Cas. 269.

Max P. Kufalk, for the respondent *Althoff.*

For the respondent *Industrial Commission* there was a brief by the *Attorney General* and *Byron H. Stebbins,* assistant attorney general, and oral argument by *Mr. Stebbins.*

BARNES, J. The appellant contends that it is not liable for injuries received by one of its employees while on his way to work; that the relation of master and servant did not exist when deceased was injured; and that if there is any liability on the part of the city it arises out of sec. 1339, Stats.

Sec. 2394—4, Stats. 1911, provides for liability for compensation "Where, at the time of the accident, the employee is performing service growing out of and incidental to his

employment." The material questions in the case are: Did the relation of master and servant exist when the accident occurred? And, if so, was Althoff performing a service growing out of and incidental to his employment? There is no dispute on the evidence pertaining to these questions and they involve propositions of law rather than matters of fact.

The relation of master and servant may extend beyond the hours the servant is actually required to labor, and in some instances to places other than the premises where the servant is employed. *Ewald v. C. & N. W. R. Co.* 70 Wis. 420, 36 N. W. 12, 591; *Helmke v. Thilmany,* 107 Wis. 216, 221, 83 N. W. 360; *Pool v. C., M. & St. P. R. Co.* 53 Wis. 657, 11 N. W. 15; *Kunza v. C. & N. W. R. Co.* 140 Wis. 440, 123 N. W. 403.

The courts very generally hold that the relation of master and servant exists when the servant is under the master's control and subject to his direction. 5 Labatt, Mast. & Serv. (2d ed.) 5425, § 1806; *Harvey v. T. & P. R. Co.* 166 Fed. 385; *Taylor v. George W. Bush & Sons Co.* 6 Pennewill (Del.) 306, 66 Atl. 884; *St. Louis, A. & T. R. Co. v. Welch,* 72 Tex. 298, 10 S. W. 529; *Powers v. Calcasieu S. Co.* 48 La. Ann. 483, 19 South. 455.

Such seems to be the holding of the English courts under a substantially similar provision of the English Workmen's Compensation Act. *Sharp v. Johnson,* 74 L. J. K. B. 566, 567; *Blovelt v. Sawyer,* 73 L. J. K. B. 155; *Hoskins v. Lancaster,* 3 Butterworth's Workm. Comp. Cas. 476; *Fitzpatrick v. Hindley Field C. Co.* 3 Workm. Comp. Cas. 37; *Lowry v. Sheffield C. Co.* 1 Butterworth's Workm. Comp. Cas. 1; *Riley v. Wm. Holland & Sons,* 80 L. J. K. B. 814; *Holmes v. G. N. R. Co.* [1900] 2 Q. B. 409.

In the instant case, when the servant reported to his foreman and received his instructions for the day and proceeded to carry out these instructions by starting for the place where he was to work, we think the relation of master and servant

commenced, and that in walking to the place of work the servant was performing a service growing out of and incidental to his employment.

The liability provided for by the Compensation Act is in lieu of any other liability whatsoever, and the remedy under it is exclusive. Sec. 2394—4, Stats. 1911. Holding as we do that the relation of master and servant existed, and the parties being subject to the Compensation Act, the remedy of the claimant is under that act, and not under sec. 1339, Stats.

By the Court.—Judgment affirmed.

TIMLIN, J., took no part.

SULLIVAN, Appellant, vs. KUOLT, Commissioner of Banking, Respondent.

SAME, Respondent, vs. CITIZENS SAVINGS & TRUST COMPANY, Appellant.

WRIGHT, Appellant, vs. KUOLT, Commissioner of Banking, Respondent.

SAME, Respondent, vs. CITIZENS SAVINGS & TRUST COMPANY, Appellant.

WESTERNHAGEN, Executor, Appellant, vs. KUOLT, Commissioner of Banking, Respondent.

SAME, Respondent, vs. CITIZENS SAVINGS & TRUST COMPANY, Appellant.

January 17—February 3, 1914.

Commissioner of banking: Taking charge of insolvent trust company: Title to trust property: Administering trusts: Appointment of new trustee: Procedure.

1. A receiver, trustee in bankruptcy, or assignee for creditors does not take title to property held in trust, unless by force of some statute, and the same is true of the commissioner of banking when his duties require him to take charge of a trust company because of insolvency or other cause.

2. The purpose for which such commissioner takes charge of a trust company under the statute (sub. 3, sec. 2022, Stats. 1913) is to liquidate its affairs and wind up its business as soon as is consistent with good business management.
3. To do this it is necessary to settle with *cestuis que trustent*, where such exist, and since the commissioner of banking represents the stockholders and creditors generally some one other than he should act as trustee, although, until the appointment of a new trustee, it is his duty to conserve and protect the trust property as far as possible.
4. The insolvency of a trust company and the suspension of its business by the intervention of the commissioner of banking and seizure of its effects incapacitated it from continuing to act as trustee, and required that a new trustee be appointed.
5. No formal action for the appointment of a new trustee is necessary, but the *cestuis que trustent* may apply to the court on notice for such appointment, or the commissioner of banking may himself make the application, and it would become his duty, under the statute, to do so if the *cestuis que trustent* unreasonably delay to make application.
6. Actions having been brought by *cestuis que trustent* against an insolvent trust company and the commissioner of banking to prevent the latter from administering certain trusts, to remove the trust company as trustee and appoint a successor, the complaints in such actions may be treated as petitions or motions addressed to the court for the appointment of a new trustee, form not being of the essence of the matter.

APPEALS from orders of the circuit court for Milwaukee county: F. C. ESCHWEILER, Circuit Judge. *Reversed on plaintiffs' appeals; affirmed on the appeals of the defendant trust company.*

Actions for the appointment of trustees. Defendants demurred to the complaints. The allegations of the complaints in the three cases, so far as they are material to the point raised by the demurrers, are these: That on October 2, 1913, the commissioner of banking took possession of all the property of the *Citizens Savings & Trust Company* under the banking laws of this state, claiming that it was insolvent, and has still held possession of the same and claims the right so to do. That, in the *Sullivan* case, among the assets that came into

his hands through the *Citizens Savings & Trust Company* was a trust deed executed by the Clark Realty Company to secure certificates issued by it; that plaintiff, *Sullivan,* had left money with the *Citizens Savings & Trust Company* to be invested in good, safe, interest-bearing securities to be selected by it, but that, instead of investing the money as directed, it had purchased Clark Realty Company certificates for the same; that the Clark Realty Company was owned and controlled by the owners of the *Citizens Savings & Trust Company,* was insolvent, and that the security was inadequate. In the *Wright* case the allegations are that the *Citizens Savings & Trust Company* was appointed by the county court of Milwaukee county trustee under the will of one Luscombe, and that, as such trustee, it invested money belonging to the trust estate in Clark Realty Company bonds secured by a trust deed, followed by allegations of the insolvency of the Clark Realty Company and inadequacy of security, as in the *Sullivan* case. In the *Westernhagen* case it is alleged that plaintiff, as executor, owns a bond of the Kaukauna Gas, Electric Light & Power Company, secured by a trust deed or mortgage executed by it to the *Citizens Savings & Trust Company;* that the security is inadequate; and that, as plaintiff is informed and believes, the Kaukauna Gas, Electric Light & Power Company is insolvent.

Each complaint alleges the insolvency of the *Citizens Savings & Trust Company;* that the *cestuis que trustent* are numerous and scattered; and that the defendant *Kuolt,* as such commissioner of banking, claims that he is entitled to administer the trusts under the trust deeds or mortgages mentioned, as the successor in trust of the said *Citizens Savings & Trust Company,* and each prays that the court remove the *Citizens Savings & Trust Company* as trustee, adjudge that *Kuolt,* as such commissioner of banking, has no right to administer said trusts, and that another suitable trustee be appointed.

To each complaint the defendant *Kuolt* and the *Citizens Savings & Trust Company* separately demurred. Each demurrer of the defendant *Kuolt* was sustained and each demurrer of the *Citizens Savings & Trust Company* was overruled. Each plaintiff appealed from the order sustaining the defendant *Kuolt's* demurrer, and the defendant the *Citizens Savings & Trust Company* appealed from each order overruling its demurrer.

Frank M. Hoyt, Jackson B. Kemper, and *George Lines,* for the plaintiffs.

For the respondent *Kuolt* and the appellant *Citizens Savings & Trust Company* there was a brief by *Flanders, Bottum, Fawsett & Bottum,* attorneys, and *James G. Flanders,* of counsel, and oral argument by *Mr. Flanders* and *Mr. Charles E. Monroe.*

VINJE, J. The question raised by the demurrer of the defendant *Kuolt* is whether he succeeds to the execution of the several trusts set out in the respective complaints by virtue of his having taken charge of the property and business of the *Citizens Savings & Trust Company* pursuant to the laws of the state. If he does, it must be by reason of some statutory provision, either express or implied, for, in the absence of such statutory provision, a receiver does not take title to property held in trust. *Le Roy v. Globe Ins. Co.* 2 Edw. Ch. 657; High, Receivers (4th ed.) § 444; 5 Thompson, Corp. (2d ed.) § 6602. Neither does a trustee in bankruptcy. 1 Perry, Trusts (6th ed.) §§ 58, 345. Nor an assignee under a voluntary assignment for the benefit of creditors. 5 Cyc. 566; 1 Perry, Trusts (6th ed.) § 336. So whether we regard the commissioner of banking as a receiver, trustee, or assignee, he does not succeed to the execution of the trust in question unless he does so by force of statute.

A careful examination of the laws upon the subject fails to disclose any such statutory provisions, either express or

implied. The *Trust Company* was engaged in business of various kinds, among others that of executing trusts, whether such duty was imposed upon it by a court, by agreement of private parties, or by operation of law. Whenever in the opinion of the commissioner of banking it becomes insolvent or unsafe, it is his duty to take charge of its property and business. But for what purpose does he take charge of it? The statute is explicit on this point. It is for the purpose of *liquidating* it, and not for the purpose of carrying it on. Sub. 3, sec. 2022, Stats. 1913, provides: "Upon taking possession of the property and business of such . . . corporation, the commissioner is authorized to collect moneys due to such . . . corporation, and do such other acts as are necessary to conserve its assets and business, and shall proceed to *liquidate* the affairs thereof," as in the act provided. The whole statutory scheme is to wind up the business of the insolvent corporation as soon as is consistent with good business management. But it must be liquidated and closed, that being the purpose for which possession is taken. To do that, he must settle with the *cestuis que trustent,* or a new trustee, and turn over the unexecuted part of the trust to them or him. He must also settle with every other creditor of the *Trust Company.* This implies two parties: on the one hand the commissioner of banking, representing the stockholders of the *Trust Company* as well as the creditors generally, and on the other, the party settled with—in the case of numerous *cestuis que trustent,* most conveniently their trustee. The statute does not contemplate that he should represent both parties in the liquidation. Very conflicting interests might arise. Whenever a claim is contested, the commissioner of banking, acting as receiver, assignee, or general trustee, represents the stockholders and the rest of the creditors, and some one other than he ought to represent the claimant. While the statute, sec. 2022, sub. 2, contemplates that the corporation whose property and business has been taken possession of by the

commissioner of banking may be permitted to resume business, it nowhere contemplates that the commissioner of banking shall carry it on or continue it longer than reasonably necessary to effect liquidation. Some of the trusts set out in the complaint will by their terms continue for many years and call for duties wholly foreign to that of the commissioner of banking.

Of course upon taking possession the commissioner of banking holds all the property and business of the corporation, including trust property, for a reasonable time until new trustees can be appointed to take charge of and execute the various trusts. And while he so holds the trust property, it is his duty to conserve and protect it as far as possible until new trustees can be appointed.

No formal action for the appointment of new trustees is necessary. The *cestuis que trustent* may by notice and motion apply to the court for the appointment thereof; or the commissioner of banking may himself upon notice move for their appointment. To do so would become his duty under the statute if the *cestuis que trustent* unreasonably delayed to make application, for he is charged with the obligation of winding up the trust business of the insolvent corporation. In the present case the complaints may be considered petitions or motions addressed to the court for the purpose of securing the appointment of new trustees. Form is not the essence of the matter.

Upon the appeal of the *Citizens Savings & Trust Company* it is clear the circuit court properly overruled its several demurrers. When the commissioner of banking took possession of its property and business it became, for the time being at least, incapable of acting as trustee, and it could become capable of resuming such duties only upon being allowed to resume its general business. In the instant case the ten days within which under sec. 2022, sub. 9, it could apply to the circuit court for an order enjoining further proceedings, have

long since expired, and plaintiffs' allegations of its insolvency are admitted by the demurrers. So it is evident that its trust duties have wholly ceased. Insolvency and the taking possession of its property and business by the commissioner of banking themselves terminated its trust capacities, and its disqualification to act as trustee still exists.

By the Court.—Each order sustaining the demurrers of the defendant *Kuolt* is reversed; each order overruling the demurrers of the *Citizens Savings & Trust Company* is affirmed; and the causes are remanded with directions to overrule each demurrer of the defendant *Kuolt* and for further proceedings according to law.

STATE, Plaintiff, vs. BOLISKI, Defendant.

January 17—February 3, 1914.

Criminal law: Possession of burglarious "machine, tool or implement:" Nitroglycerine: Construction of statutes.

1. A bottle of nitroglycerine and a fuse and detonating cap, though not actually in combination when found in the possession of a person, constituted a "machine, tool or implement designed and adapted for . . . forcing or breaking open any building, room, vault, safe or other depository," within the meaning of sec. 4411*a*, Stats. 1898. The contrary is not shown by the mere fact that said section was afterwards amended (ch. 88, Laws of 1911) so as to expressly include "nitroglycerine or other explosive."
2. Like all other rules of construction, the rule that laws of a penal character are to be strictly construed is not to be applied unless obscurity of meaning in a statute calls for construction.
3. The dominating purpose of all construction being to arrive at the legislative intent, words should be read sensibly, and sometimes a liberal construction is required even in respect to a penal statute.
4. If the legislative purpose in a penal statute is uncertain and the words used may mean one thing or another according to the intent with which they were used, they should be read, ordinarily, so as to minimize rather than extend their penal character.

REPORTED under sec. 4721, Stats., from the circuit court for Waupaca county: BYRON B. PARK, Circuit Judge. *Question answered in the affirmative.*

Prosecution under sec. 4411*a*, Stats. 1898, for being possessed of a "machine, tool or implement designed and adapted for cutting through, forcing or breaking open any building, room, vault, safe or other depository, knowing the same to be designed and adapted for such purpose, with intent to use or employ the same therefor in order to steal from any building, room, vault, safe or other depository any money or other property. . . ."

The accused having been duly informed against under such section entered a plea of not guilty and was tried on the issue thus formed.

The evidence on the trial was to this effect: The accused was arrested in a saloon while offering playing cards for sale. These articles were found in his possession: A bottle, about two thirds full of nitroglycerine, a tin box, containing three pieces of fuse, each seven or eight inches long fitted with a detonating cap, such as are used to explode dynamite and nitroglycerine, a spring such as is ordinarily used for confining a torpedo to a railway track, a piece of slate about the size of a playing card, a candle about three inches long, and a bar of soap. Between the time of the arrest and the trial the accused escaped from jail twice. The jury rendered a verdict of guilty.

The court duly certified here for an answer this, in effect: Are the articles found in the possession of the accused and described in the information such as are mentioned in sec. 4411*a*, so warranting the court in pronouncing judgment on the verdict?

For the plaintiff there was a brief by the *Attorney General, Winfield W. Gilman,* assistant attorney general, and *Llewellyn Cole,* district attorney, and the cause was argued orally by *Mr. Gilman.* They cited, among other cases,

Comm. v. Day, 138 Mass. 186; *Comm. v. Johnson,* 199 Mass. 55, 85 N. E. 188; *Comm. v. Conlin,* 188 Mass. 282, 74 N. E. 351; *State v. Layton,* 191 Mo. 613, 90 S. W. 724; *State v. Hanley,* 133 Iowa, 474, 110 N. W. 914; *Foster v. People,* 3 Hun, 6, affirmed 63 N. Y. 619; *People v. Myers,* 2 Hun, 6; *People v. Reilly,* 49 App. Div. 218, 63 N. Y. Supp. 18, affirmed 164 N. Y. 600, 59 N. E. 1128; *State v. Wayne,* 62 Kan. 636, 64 Pac. 69; *People v. Sansome,* 84 Cal. 449, 24 Pac. 143; *People v. Jones,* 124 Mich. 177, 82 N. W. 806.

For the defendant the cause was submitted on the brief of *John C. Hart.*

MARSHALL, J. It is considered that the bottle of nitroglycerine with the fuse and detonating cap clearly answer to the calls of the statute for a "tool, machine or implement," adapted to the particular use mentioned therein, designed to that end, and intended to be used therefor.

The fact that the legislature by ch. 88, Laws of 1911, changed the statute so as to expressly include "nitroglycerine or other explosive" does not militate, necessarily, against an explosive in connection with a fuse and detonating cap being, in a proper sense, a machine, tool, or implement, within the legislative meaning. It is not infrequent that the legislature makes a law, in reasonably plain terms, as one would commonly consider the language used, and, later, because of attempts to attribute to the words thereof a narrow technical meaning, minimizing or defeating the purpose, such purpose is re-expressed with intent to render it so unmistakable as to leave no possible room for failure to comprehend it.

Counsel for the accused indulges in the idea that the terms in question will admit of a construction sufficiently narrow as to exclude therefrom the articles in question, either singly or in combination, and relies upon the rule, often referred to, and applied in proper cases, that laws of a penal character are to be strictly construed. The mistake is often made of sup-

posing that to be a rule of general or universal application; but such is not the case. No rule of construction has any office to perform until obscurity of meaning is discovered. Where words, viewed in the abstract, will admit of two or more meanings, but the particular one intended by the law-making power is plain, to resort to construction for the purpose of narrowing the scope of the words, is entirely outside of the judicial field.

So construction must wait upon need for construction, and then sensible construction should be applied. That requires, when the intention of the legislature is obvious, such reading of language within the scope of its meaning as to give intended vitality to such language. Sometimes a strict and sometimes a liberal construction is required, even in respect to a penal law, because the dominating purpose of all construction is to carry out the legislative purpose.

Here it is manifest that the legislature intended to make the possession of any physical instrumentality, designed and intended to be used for the criminal purpose mentioned in the statute, an offense. So words were used to accomplish that purpose. Those words then should be read with that purpose in view. If when so read they are plain,—there is no need for construction. If then not plain, they should be read sensibly; that is, reasonably so as to accomplish the legislative purpose if a fair meaning of the words will permit of it. If the purpose is uncertain and the words to express it might mean one thing or another, according to the intent with which they were used, then they should be read, ordinarily, so as to minimize rather than extend their penal character. These principles are so well understood that they may well be stated without reference to authorities. They are basicly elementary in the law.

To repeat, the purpose here being plain, the meaning of "machine, tool or implement" is unambiguous. Tools in the broad sense include implements in general, or objects used

to perform a physical operation when plied or directed by hand and are movable, to accomplish such operation, as distinguished from a machine operated by some motive power other than that of the hand. A machine is a combination of parts by which, when motive power is supplied, it may be transmitted and, directly, or by relation to another physical instrumentality, produce some physical result. The three terms "tool, implement or machine" are comprehensive enough to include substantially all physical instrumentalities, by which, through human interference, physical results may be accomplished.

In this case they were all the parts of a powerful instrumentality, appropriate to accomplish the destruction of any ordinary hindrance to access to "any building, room, vault, safe or other depository" of property. The fact that the parts were not actually in combination when found in the possession of the accused is unimportant. If, in such a case, one has in his possession, the parts of a machine which can easily be put in connection for the production of a particular physical result, the mere fact that, for convenience, or personal safety, or otherwise, they are kept out of connection, waiting upon an occasion for combining them, would not take from their character as a "tool, implement or machine," and so render the person immune from the consequences of violating the statute.

It follows from the foregoing that the question submitted must be answered in the affirmative and the cause be remanded for further proceedings according to law.

By the Court.—So ordered.

CITY OF MILWAUKEE, Appellant, vs. MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Respondent.

October 30, 1913—February 24, 1914.

Street railways: Franchises: Validity: State only may question: Right to use streets not yet opened: Commencement of term of franchise: Acceptance.

1. In granting a franchise to a street railway company under sec. 1862, Stats., a city acts as the agent of the state; and only the state, by an action of *quo warranto*, can question the validity of such franchise.
2. *It seems* that a city may grant to a street railway company a franchise to use, "when opened," streets for the opening of which proceedings are then pending.
3. Where the resolution granting a franchise to use certain streets fixed a certain date for the commencement of the term of such franchise, without requiring acceptance thereof, *it seems* that such provision governs, although the resolution also provided that "the rights hereby conferred shall be subject to all the terms and conditions set forth in" a previous franchise ordinance, which provided that the term thereof should commence upon the passage and publication of the ordinance *and acceptance thereof.*

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Modified and affirmed.*

In February, 1906, the common council of the city of *Milwaukee,* by resolution, granted to the defendant the right to use Thirty-eighth and Fortieth streets "when opened" and Cold Spring avenue (Hillside Lane) "as it now exists or hereafter may be opened" for street railway purposes. Proceedings for the opening of each of said streets were pending at the time the resolution was adopted, and were afterwards completed, and the defendant laid its tracks in the streets when opened, and continued to use the same until this action was begun on May 29, 1912, to compel the defendant to remove the same on the ground that it had no valid franchise

covering the streets in question. The defendant answered on the merits and also interposed a plea in abatement claiming the validity of the franchise could be tested only by the state in an action of *quo warranto*. The trial court took evidence on the merits, reserving a ruling upon the plea in abatement, and at the close of the trial found for the defendant on the merits and also sustained its plea in abatement, and ordered the complaint dismissed on the merits. From a judgment entered accordingly the plaintiff appealed.

For the appellant there was a brief by *Daniel W. Hoan*, city attorney, and *Clifton Williams*, special assistant city attorney, and oral argument by *Mr. Williams*.

For the respondent there was a brief by *Miller, Mack & Fairchild*, and oral argument by *E. S. Mack*.

The following opinion was filed December 9, 1913:

VINJE, J. Counsel for plaintiff correctly state that the issue on the merits is whether the defendant had a valid franchise on the streets in question. It is claimed to be invalid because the city had no right to grant a franchise on a street not opened, to take effect "when opened," even though proceedings for the opening of the street were pending when the franchise was granted. Another ground of invalidity relied upon is that the defendant did not accept the franchise in writing. The resolution provided that "the rights hereby conferred shall be subject to all the terms and conditions set forth in a certain street railway franchise granted to the *Milwaukee Electric Railway & Light Company* by the common council of the city of *Milwaukee* on January 2, 1900." The franchise of 1900 provided that "all the rights, privileges and franchises conferred by this ordinance shall be for and during the term commencing at the passage and publication of this ordinance *and acceptance thereof*, and ending December 31, 1934." The resolution granting the franchise in question reads: "All the rights, privileges and franchises con-

ferred by this resolution shall be for and during the term commencing at the passage and publication hereof and ending December 31, 1934." It is claimed the language of the ordinance of 1900 and not that of the resolution of 1906 governs as to when and how the franchise shall take effect, and that under the ordinance of 1900 there must be a written acceptance.

Such in brief are the issues raised by the merits of the case. They involve the validity of the franchise under which the defendant claims to operate. Such franchise was granted pursuant to the provisions of sec. 1862, Stats. 1911. When lawfully granted, it is a franchise grant from the state and not from the municipality, as the latter acts only as the agent of the state. *Manitowoc v. Manitowoc & N. T. Co.* 145 Wis. 13, 129 N. W. 925. Only the state, by an action of *quo warranto,* can question the validity of the franchise under which the defendant operates its cars on the streets in question. *Ashland v. Wheeler,* 88 Wis. 607, 617, 60 N. W. 818; *Stedman v. Berlin,* 97 Wis. 505, 73 N. W. 57; *State v. Milwaukee E. R. & L. Co.* 136 Wis. 179, 189, 116 N. W. 900, and cases cited. The trial court, therefore, properly sustained the plea in abatement.

Mindful of the rule of law announced in the above cited cases, this court extended to the state the privilege of becoming a party plaintiff to the end that, since the case was tried on the merits, it might be finally disposed of on the record made. The state, through the attorney general, for satisfactory reasons, declined to become a party, and the action must therefore be dismissed on the ground that plaintiff has no legal capacity to maintain the same. But we have carefully considered the record before us with the result that we find no merit in plaintiff's case. This statement should not, however, be construed as in any way affecting the rights of the state should it see fit to test the validity of the franchise in question by a proper action.

The judgment of the circuit court is modified by ordering a dismissal of the action on the ground that plaintiff has no legal capacity to maintain the same, instead of a dismissal on the merits, and as so modified is affirmed.

By the Court.—Ordered accordingly.

A motion for a rehearing was denied, with $25 costs, on February 24, 1914.

RIGER, Appellant, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Respondent.

November 18, 1913—February 24, 1914.

Railroads: Injury to person at street crossing: Excessive speed of train: Evidence: Opinions: Changing jury's finding.

1. Any estimate of speed by a witness is in one sense opinion, but it may not be opinion evidence within the legal meaning of that term.
2. The question being whether the speed of a train exceeded the lawful rate of twelve miles per hour, the testimony of a witness who had but a momentary view of the train at a time when he was excited and otherwise engrossed, fixing the speed at about sixteen or seventeen miles per hour, was opinion evidence.
3. Where such testimony, standing alone, was opposed by the uncontroverted fact that the train stopped within thirty feet after signal, and the positive testimony of five trainmen that the speed was from four to seven miles per hour, one comparing the speed to that of a man walking at a fair gait, the trial court was justified in changing the jury's finding that the speed exceeded twelve miles per hour.

APPEAL from a judgment of the circuit court for Milwaukee county: F. C. ESCHWEILER, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *Rubin & Zabel,* attorneys, and *Horace B. Walmsley,* of counsel, and oral argument by *W. B. Rubin.*

For the respondent the cause was submitted on the brief of *Edward M. Smart.*

The following opinion was filed December 9, 1913:

TIMLIN, J. The plaintiff was run down and injured by a car of the defendant railway company on or about November 3, 1910, at a street crossing. The jury returned a verdict fixing his damages at $5,000 and finding that the train in which the car was approached the crossing at a speed greater than the lawful speed of twelve miles per hour, which excessive speed was the proximate cause of plaintiff's injury. Plaintiff was not guilty of more than a slight want of ordinary care which proximately contributed to his injury in failing to look and listen for an approaching train before stepping on the track.

The court changed the answer relative to the speed of the train so as to find that the speed did not exceed twelve miles per hour. It was conceded that the engine bell was properly rung. The court ordered judgment on the verdict so altered in favor of the defendant. No claim is made by the appellant that he was entitled to judgment on the verdict after the answer relative to speed was changed, if the change was properly made. The plaintiff produced one witness (Swedlow), not specially qualified but competent, who estimated the speed of the train at "about sixteen to seventeen miles an hour." The defendant produced two brakemen, the conductor, fireman, and engineer, five witnesses competent and better qualified to judge, who testified that the rate of speed was from four to seven miles an hour. One of these witnesses compared the speed to that of a man walking at a fair gait. And he also added that the train stopped within thirty feet after signal. These five witnesses were, it is true, interested as employees of the defendant in absolving themselves from blame for the accident.

The question is, Had the circuit court authority to change

the answer of the jury in the respect stated and substitute the contrary answer? The opportunity of Swedlow to observe the rate of speed was only momentary. He testifies:

"I saw the train just a second before it hit him." "I thought he was hurt and I was scared." "When I saw him get hit I was thinking about him and I helped take care of him and take him away." "That train passed right in front of me very quick, that is all I saw of it." "The train was going about sixteen or seventeen miles an hour." "It did not take that train more than one minute (second?) to cross that street there, may be two, I don't know exactly." "All that went by was an engine and two cars."

Testimony relative to rate of speed is an estimate except in rare instances in which some measuring appliance is used. Such testimony may be to a fact or it may shade off into a mere opinion. For illustration: Where one testifies to a rate of speed which he estimates at twenty or forty miles per hour, that presents a question of fact as against a claim that the rate of speed was ten or twenty miles per hour. The former includes predication that the speed was more than ten or twenty miles per hour and of course goes beyond such predication. But where one witness testifies that a rate of speed was twenty miles per hour and the only countervailing evidence is that of another equally credible witness to the effect that the rate of speed was twenty-two miles per hour, both are testifying to estimates, and such small difference becomes mere matter of opinion. The high minimum rate is fixed, and the smaller the difference between such high minimum and the maximum the more clearly the opinion character of the evidence appears and the more meager the data upon which to rest the opinion. Every estimate is in one sense opinion, but not opinion evidence within the legal conception of the latter term. So in the case at bar the lawful maximum being twelve miles per hour, and the witness, from a momentary view while in a state of excitement and otherwise engrossed, fixing it at "about sixteen or seventeen miles per

hour," is manifestly giving opinion evidence. Indeed, to many persons twelve miles an hour is "about" sixteen miles per hour. The learned circuit judge said:

"The testimony as to this claimed excess of three to four miles per hour is so slight, vague, and unsatisfactory as against the positive testimony of the five trainmen, that the finding of the jury in the second question, that the speed was greater than twelve miles per hour, must be set aside."

The opinion of Swedlow, formed from very imperfect observation and loosely expressed, was, as stated, met by the uncontroverted fact relative to the distance within which the train was stopped and by the positive evidence of the comparatively large number of witnesses whose testimony differed so widely from a rate of twelve miles per hour and who compared the actual speed with that of familiar moving objects. It must have been perjured testimony on their part if the opinion of Swedlow was correct. For no experienced man with full opportunity for observation could be honestly mistaken with reference to whether the speed was four to seven or sixteen to seventeen miles an hour.

The decision of the circuit judge is entitled to weight. The testimony which he considered completely overborne does not rise above the grade of opinion evidence, and under such circumstances his ruling changing the answer to conform to the evidence must be upheld.

By the Court.—Judgment affirmed.

A motion for a rehearing was denied, with $25 costs, on February 24, 1914.

GARAGE EQUIPMENT MANUFACTURING COMPANY, Respondent, vs. DANIELSON, Appellant.

November 20, 1913—February 24, 1914.

Equity: Adequate remedy at law: Waiver of objection: Reformation of contract: Evidence: Sufficiency: Laches: Jurisdiction: Milwaukee civil court: Appeal: Affirmance.

1. In an action for equitable relief the objection that plaintiff has an adequate remedy at law is waived if not taken by demurrer or answer.
2. Reformation of a written contract on the ground of mutual mistake can be had only upon clear and convincing evidence thereof.
3. Where reformation was granted upon what the trial judge in an opinion styled "a slight preponderance of the evidence," but this court is satisfied that the evidence was in fact clear and convincing, the judgment below, being right, is affirmed, although arrived at by the adoption of an incorrect rule of law.
4. Under the circumstances of this case (stated in the opinion), plaintiff was not guilty of laches in failing to detect the mistake in the contract, nor was there unreasonable delay in seeking reformation.
5. The civil court of Milwaukee county having no equitable jurisdiction, the affirmative defense of a mutual mistake in the execution of a contract sued on in that court is not available without reformation of the contract, and the action to reform is properly brought in the circuit court.

APPEAL from a judgment of the circuit court for Milwaukee county: F. C. ESCHWEILER, Circuit Judge. *Affirmed.*

Suit in equity to reform a building contract and to enjoin, pending the suit, the prosecution by the defendant of an action previously brought by him on the same contract in the civil court of Milwaukee county to recover a balance claimed to be due him for the construction of the building. Plaintiff intended to erect a building for its manufacturing plant on a lot on National avenue in the city of Milwaukee, and plans and specifications therefor were prepared by its ar-

chitect, J. H. Esser. Later the plaintiff abandoned its intention to build on the National avenue lot, and proceeded to erect its building at the corner of South Pierce street and Eleventh avenue on a lot of a different shape and size. The plans for the National avenue building contemplated the placing of the boiler house inside of the main building. The proposed plans for the new site provided for the lengthening of the building sixteen feet, for a boiler house outside of the main building, and for the substitution of a concrete floor in place of a floor of mill construction for the first floor of said building. For additional facts see *Danielson v. Garage E. M. Co.* 151 Wis. 492, 139 N. W. 443.

The court found that on or about the 26th day of March, 1910, the plaintiff and defendant entered into an oral agreement whereby defendant agreed to erect the building according to a change in the plans as above stated; that such agreement was at or about said date reduced to writing, but that by mutual mistake of the parties thereto it referred to plans and specifications "signed by the parties" when none were in fact signed by them, and by mutual mistake it referred to the original plans without specifying the changes agreed upon. The judgment corrected the contract by striking from paragraph numbered 1 thereof the words "which plans, drawings, and specifications are identified by the signatures of the parties hereto," and inserting in the place thereof the words "subject to certain modifications to be made therein by the architect, which shall consist in the lengthening of the factory building herein referred to from a depth of 140 feet to a depth of 156 feet, the construction of the boiler room outside instead of inside of the main lines of said building, and the substitution in the first floor of said building of a floor of concrete construction in the place of a floor of mill construction." The contract was further ordered amended in other portions thereof to make it conformable to the changes above indicated.

From a judgment entered accordingly, and which also vacated the temporary order restraining the defendant from prosecuting the action brought in the civil court, the defendant appealed.

Charles T. Hickox, for the appellant.

For the respondent there was a brief by *Flanders, Bottum, Fawsett & Bottum,* and oral argument by *Charles E. Monroe.*

The following opinion was filed December 9, 1913:

VINJE, J. One of the principal contentions of the defendant is that plaintiff had an adequate remedy at law, because the ambiguity in the contract as to what plans were therein referred to could be explained by parol evidence. It is needless to inquire into the merits of this contention, for the objection that plaintiff had an adequate remedy at law, not having been taken either by demurrer or answer, was waived. *Meyer v. Garthwaite,* 92 Wis. 571, 66 N. W. 704; *Bigelow v. Washburn,* 98 Wis. 553, 74 N. W. 362; *Pippin v. Richards,* 146 Wis. 69, 130 N. W. 872.

In his written opinion the trial judge says, in effect, that under the presumptions that arise and by a slight preponderance of the evidence plaintiff is entitled to a reformation of the contract. Were the evidence no stronger than this in plaintiff's favor, reformation would have to be denied, for it is settled law in this state that reformation of a written contract on the ground of mutual mistake can be had only upon clear and convincing evidence thereof. *Harter v. Christoph,* 32 Wis. 245; *Blake O. H. Co. v. Home Ins. Co.* 73 Wis. 667, 41 N. W. 968; *Kruse v. Koelzer,* 124 Wis. 536, 102 N. W. 1072. After a careful examination of the evidence we are satisfied that it meets the legal call, and the trial judge's characterization of it as only slightly preponderating becomes immaterial. If the judgment is in fact correct, it must be affirmed though arrived at on the part of the trial

court by the adoption of an incorrect rule of law. The judge correctly found the facts and ordered the right judgment to be entered. An inadvertence or a mistake in his written opinion cannot affect the result. *Harris v. Welch,* 148 Wis. 441, 447, 134 N. W. 1041; *Estate of Koch,* 148 Wis. 548, 561, 562, 134 N. W. 663; *Gauf v. Milwaukee A. Club,* 151 Wis. 333, 336, 139 N. W. 207. To set out the evidence that supports the conclusion reached would not add to the legal value of the opinion, owing to the facts being peculiar to this case.

The trial court found as a conclusion of law that plaintiff was guilty of laches in failing to examine the contract and to detect the mistake. No finding of fact to that effect is made, and we think none would be supported by the evidence. The contract was entered into about the 26th of March, 1910, but it was not until July, 1911, that plaintiff received a bill from defendant showing that extra charges were claimed. Then efforts at settlement were made, which occupied some time, and finally defendant brought action in the civil court to recover the balance claimed due him. That action was appealed to the circuit court, and from it to this court (see 151 Wis. 492, 139 N. W. 443), and remanded for further proceedings. This action was begun in March, 1913. No mere inspection of the contract would show what plans were referred to, and it was not until plaintiff was apprised by defendant's claim that plans with the boiler house inside was what the contract called for, that it had notice of the mutual mistake. After that time it did not delay unreasonably in seeking reformation, in view of the effort at settlement and the pendency of the action in the civil court.

Since no equitable jurisdiction is conferred upon the civil court of Milwaukee county, the action to reform the contract was properly brought in the circuit court. Without reformation plaintiff could not, in an action at law, avail itself of the

affirmative defense of mutual mistake in the execution of the contract. *Casgrain v. Milwaukee Co.* 81 Wis. 113, 51 N. W. 88.

By the Court.—Judgment affirmed.

A motion for a rehearing was denied, with $25 costs, on February 24, 1914.

AMERICAN GRANITE COMPANY, Appellant, vs. KRINGEL, Administrator, and others, Respondents.

November 20, 1913—February 24, 1914.

Insane persons: Lucid intervals: Bills and notes: Insanity of maker: Finding of fact.

1. A person who, in general, is insane may bind himself by contract made during a lucid interval which renders him capable of appreciating the nature of his acts and exercising judgment in respect thereto.
2. A finding by the circuit court that at the time of the execution of promissory notes the maker was an insane person, mentally incompetent to transact business, is *held* to be sustained by the evidence.

APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Affirmed.*

Action to recover on two promissory notes made by Albert J. Kringel, deceased. The claim was presented in county court and allowed. It was contested upon the ground of Mr. Kringel being insane and wholly incompetent to do business at the date of the notes. On appeal to the circuit court the judgment of the county court was reversed; the claim of incompetency being sustained. The finding in that regard is this:

"Albert J. Kringel was on the 9th day of November, 1908, and continually for a considerable period of time prior

thereto had been and up to the time of his death was at all times an insane person, mentally incompetent to do or transact business."

The evidence tended to show this: Kringel was, during all the times material to the case, severely afflicted by a disorder commonly affecting the mind and did so in the particular instance. Such disease is of progressive character and, ordinarily, results in mental incompetency. In the particular instance it so resulted and the incompetent condition existed when the notes were made, and continued to the end. Kringel was placed under guardianship a short time after the notes were made and was declared insane and placed in a hospital for detention and treatment as an insane man. His infirmity resulted in his death a few months after the notes were given. There was much evidence showing in considerable detail characteristics and conduct of the deceased indicating mental incompetency, and opinion evidence in that respect, both of expert and nonexpert character. There was also evidence to the contrary.

For the appellant there was a brief by *Carroll & Carroll,* and oral argument by *W. J. Carroll.*

O. W. Bow, for the respondent administrator.

William W. Wight, guardian *ad litem,* for the infant respondents.

Otto G. Hackbarth, for the respondent widow.

The following opinion was filed December 9, 1913:

MARSHALL, J. The only point made of sufficient merit to warrant mention of it, is that the finding of fact as to the mental condition of Kringel when the notes were made, is contrary to the evidence. The general character of the evidence on the subject, as indicated in the statement, is sufficient to show that the question is ruled in favor of respondent by the principle that trial findings of fact must prevail on appeal unless contrary to the clear preponderance of the evi-

dence. There is no reason that we can perceive why that rule should not have its full effect in this case. It is one where observance of the witnesses and listening to their testimony is generally very helpful in arriving at the right of a controversy. All the indications are that the trial court came to the conclusion which it did with full appreciation of the law that a person who, in general, is insane, may bind himself by contract made during a lucid interval rendering him capable of appreciating the nature of his acts and exercising judgment in respect thereto.

By the Court.—The judgment is affirmed.

A motion for a rehearing was denied, with $25 costs, on February 24, 1914.

ZWIETUSCH, Administratrix, and others, Respondents, vs. LUEHRING and others, Appellants.

November 20, 1913—February 24, 1914.

Receivers: Judicial sale of leasehold interest: Obligations assumed by purchaser: Statute of frauds: Purchase by one for benefit of others: Landlord and tenant: Assignment of lease: Liability of assignee: Consent of lessor: Surrender and re-entry: Giving option to purchase: Actions: Election of remedies: Estoppel: Waiver: Evidence: Competency: Witnesses: Transactions with persons since deceased: Parol evidence to explain judicial order: Appeal: Error must affirmatively appear.

1. An order for the sale by a receiver of the interest of an insolvent corporation in a lease of an amusement park provided that upon the sale being made and confirmed the purchaser should execute a contract assuming the obligations of the lease and agreeing to pay the rent reserved therein; the notice of sale stated that the "interest and liability as lessee" of such corporation would be sold; and the receiver's report of sale and the order of confirmation recited that the sale had been made in conformity to the order of sale. *Held*, that the purchaser

at the sale, being chargeable through his attorneys, if not personally, with knowledge of the contents of such order and notice of sale, was liable for the rent thereafter accruing on the lease, he having taken possession of the premises and assigned the lease to a corporation, although he did not execute any contract assuming the obligation of the lease and neither the report of sale nor the order of confirmation made any specific reference to such condition or requirement.

2. The fact that the receiver's report of sale stated that he had executed a deed to the purchaser before confirmation, which was contrary to the order of sale, and that such report was confirmed, would not relieve such purchaser from the liability assumed when he made the purchase; nor could the purchaser escape the burdens then assumed by obtaining possession of the deed and then refusing to enter into a contract as directed by the order of sale. The statute of frauds has no application to such a situation.

3. Although a lease in terms requires the lessor's consent to an assignment thereof, such consent is not required where the assignment is by operation of law, as in the case of a judicial sale.

4. Where a lease provided that an assignment should not release the party assigning, though consented to by the lessor, but that in such case both assignor and assignee should be liable, a statement by the lessor, at a receiver's sale of the leasehold interest, that he had no objection to the sale but would do nothing to jeopardize his claim against the stockholders of the corporation whose assets were being sold, could not be construed as a refusal to consent to the transfer.

5. The lessor having been given no opportunity to accept the written obligation of the purchaser, a mere statement by him after the sale that he would be a fool to take such obligation when he had an opinion from his attorney that wealthy men, stockholders in said corporation, were liable to him, would not amount to a refusal to assent to the transfer, especially when made in ignorance of the fact that the men referred to were among the real purchasers.

6. The remedy, if any, against stockholders of the insolvent lessee was not inconsistent with holding the subsequent assignees or purchasers of the lease for the rent; hence there was no election by the lessor between inconsistent remedies.

7. Where by the terms of a receiver's sale of corporate property, including a leasehold interest in land, the purchaser was required to assume the obligations of the lease, and one stock-

holder, pursuant to a reorganization agreement, purchased the property for the benefit of himself and other stockholders, all of such associates became bound by the obligation assumed.

8. A change of position by one person in reliance upon the conduct of another is essential to an estoppel *in pais*.

9. Waiver is the intentional relinquishment of a known right, benefit, or advantage.

10. Where the facts and circumstances relating to the subject are admitted or clearly established, waiver becomes a question of law, but if different inferences may be drawn from the evidence a question of fact is presented.

11. Acts of the lessors of property, after a receiver's sale of the lease, nominally to an individual purchaser who in fact represented responsible associates, evincing an unwillingness to recognize such nominal purchaser as tenant, all of which acts were done in ignorance of their claim against such associates, do not amount to a waiver of such claim.

12. In an action to charge the real purchasers of a leasehold with the rent reserved in the lease, the legal proceedings in which the sale was ordered, the agreement between the nominal purchaser and the other defendants, and their organization of a corporation to take over the lease, were all competent evidence.

13. In an action by heirs of a lessor to recover rent from alleged assignees of the lease, a defendant who took the assignment in his own name though in fact for the benefit of himself and his codefendants, all of whom were stockholders in a corporation which they sought thereby to reorganize, and who, in turn, transferred the same to a new corporation organized by them,—was incompetent under sec. 4069, Stats., to testify to a conversation with the deceased lessor, although he claimed to hold his stock merely as agent of a lumber company of which he was a stockholder and officer.

14. In such action, statements made by the attorney of the deceased lessor to one of the defendants in the presence of the lessor, would be immaterial unless concurred in by the client, and if concurred in that fact could not be shown by such defendant.

15. Under sec. 3072*m*, Stats., error to justify reversal must affirmatively appear to have been prejudicial to the appellant, and this does not appear from the exclusion of evidence, when the court is not advised what was intended to be shown by the witness nor how it would affect the rights of the parties.

16. An order of court cannot be explained by evidence of a conversation between an attorney of one of the parties and the presiding judge.

17. Where the assignee of a lease became insolvent and failed to pay the rent, the leasing of the premises by the lessors to a third person at a reduced rental before the expiration of the term, under an agreement with the assignors that it should not "prejudice or affect in any way the rights or claims of the lessors against any of the parties liable upon or under the original lease" if any liability existed thereunder, did not amount to a surrender of the lease or a re-entry of the lessors and did not release the parties so liable, but they were entitled to credit for the rent received.

18. An option to purchase the leased premises given by the lessor to a third person, without any mention of the lease, which option was never accepted and never became a binding contract, did not constitute a re-entry so as to relieve the lessee from the payment of rent.

APPEAL from a judgment of the circuit court for Milwaukee county: OREEN T. WILLIAMS, Circuit Judge. *Affirmed.*

This action was brought to recover rent alleged to have accrued from and after August 14, 1908, to the amount of $9,000. A verdict was directed for the plaintiffs, and from a judgment entered thereon defendants appeal.

The lease was made between plaintiffs' predecessors in title and one Richard C. Kann, on November 15, 1904, for a period of ten years, at an annual rental of $4,000. The lease provided that the lessee might assign it, provided the assignee should at the time of the assignment execute and deliver to the lessor a written instrument agreeing to pay the rent reserved in the lease and to perform all the conditions, covenants, and agreements thereof. It further provided that such assignment should not release the lessee, but that he should remain personally liable in the event of an assignment. It also recited that any subsequent assignment should be made only on the same terms and subject to the same conditions as were provided for in reference to the first assignment. It further provided that the leased premises should be used for an amusement park, and that the lessee should expend in buildings and improvements thereon the sum of $75,000 be-

fore opening it to the public. The lessee was given ninety days after the expiration of the term in which to remove the improvements placed thereon, but it was provided that in case there was any default in the payment of the rent or taxes agreed to be paid, or a failure to otherwise comply with the terms of the lease, the lessor might enter upon the premises and sell the improvements thereon and apply the proceeds to the payment of the amount due the lessor, the overplus, if any, to be paid to the lessee. The covenants and conditions of the lease were made binding on the parties, their legal representatives and assigns, but such provision was not to be construed as permitting an assignment of the lease or a subletting of the premises, except in the manner provided for in the lease.

On December 6, 1904, the lease was assigned by Kann to the International Construction Company, a corporation which was organized for the purpose of operating an amusement park on the leased premises. This corporation agreed with Kann to assume all of the obligations imposed on him by the lease and entered into possession of the premises and remained in possession thereof until about November, 1907. All of the defendants in this action, except *Luehring,* were stockholders in the corporation. Bonds to the extent of $100,000 were issued by the corporation and were largely subscribed for by its stockholders. In the fall of 1907 the company was financially embarrassed and its stockholders held a series of meetings to devise means for financing the enterprise. These meetings, or some of them, were attended by Oscar B. Zwietusch, who was then a stockholder in the corporation. He was also one of the lessors, having, with his brother *Edward O.,* inherited the leased premises from his father, who died in 1903. It was finally decided to make an assessment against the stockholders of an amount sufficient to pay debts and to place the corporation in a position where it could continue the amusement business during the year

1908, and a written agreement was entered into whereby the stockholders agreed to ratably contribute the necessary funds, the amount of the assessment being limited to fifty per cent. of the face value of the stock held. The agreement recited that it was necessary to reorganize the corporation and a plan of reorganization was outlined. In brief, it was proposed to issue paid-up stock in the corporation to be formed to the amount of the bonds held by the stockholders in the existing corporation and also to the amount advanced on the assessment to take care of present and future obligations. *George F. Luehring* was named as trustee to collect the assessment and to settle and compromise the outstanding claims. He also signed the contract, representing that he was the holder of ten shares of stock in the company. It seems, however, that this stock was in fact owned by the Hilty Lumber Company, of which he was secretary. *Luehring* collected $12,000 or $13,000, with which he settled with substantially all of the creditors. In the meantime one Scholl commenced an action against the corporation and recovered a judgment, of which a transcript was filed in the circuit court, and sequestration proceedings were brought in behalf of the plaintiff. The defendants, excepting Kann, procured an assignment of this judgment, and had their own attorney substituted for the attorneys who represented the plaintiff, and the defendants then apparently proceeded to conduct the reorganization proceedings through the receivership. It was decided by the stock and bond holders to sell the property of the corporation and that *Luehring* should buy it in for the signers of the agreement. On petition the court ordered a sale to be made, and it was made to *Luehring* and confirmed by the court. This sale specifically covered the leasehold interest of the corporation in the premises.

Among other things, the order of the court directing the sale of the property of the International Construction Company directed that all of the property of said corporation be

sold, including "its interest as lessee in the property described in said lease upon which said Wonderland Amusement Park . . . is situated, and convey the same to the purchaser or purchasers free of all liens and incumbrances thereon, . . . excepting the lien of said lease under which the defendant company holds possession of the premises upon which its said amusement park is located, upon confirmation of said sale by this court and upon said purchaser executing an agreement with the receiver herein, to be ratified and confirmed by this court, binding such purchaser to assume and pay the rent for said amusement park due and to become due and to assume all the obligations of said lease in accordance with its terms, conditions, and limitations, together with an acceptance of said undertaking or agreement by the lessors of said premises."

This order was dated February 6, 1909. The provision therein requiring the purchaser of the leasehold interest to enter into an agreement to assume and pay the rent and all the obligations of the lease was inserted at the instigation of the attorney who then represented the lessors. The property was sold to the defendant *Luehring* on February 20th, for his benefit and the benefit of his codefendants, for the sum of $500. The notice of sale recited that the "interest and liability" of the corporation in the lease would be sold.

On February 21st the receiver made his report, reciting the sale and the fact that he had conveyed all of the property of the corporation to the defendant *Luehring* "free of all liens and incumbrances thereon . . . excepting the lien of said lease under which the defendant company holds possession of the premises upon which its said amusement park is located." The report specifically recited that the interest of the corporation in the lease had been sold.

On the same day an order was entered confirming the sale, which also recited that all of the property of the corporation was sold to the defendant *Luehring* "free and clear

of all liens and incumbrances thereon, . . . excepting only the lien created by the terms and conditions of the lease." It further recited that the sale had been made in conformity with the terms and conditions of the order of sale.

The receiver's report did not recite that the leasehold interest had been sold subject to the condition that the purchaser should execute an agreement with the lessor binding such purchaser to assume and pay the rent due and to become due and to assume other obligations of the lease. Neither did the order of confirmation contain any such requirement. The order of confirmation was made *ex parte* and was not submitted to the lessors' attorneys.

Oscar B. Zwietusch appeared at the sale and stated that he did not want to interpose any objection to it, but wanted it understood that the lease was a prior lien on all the buildings in the park and that such buildings were part of the park itself, a part of the real estate, and that the lessors held a lien thereon, and that whoever bought the property would buy it subject to that lien, and that they would not let any one into possession that would hurt "our claim in any way that we hold against the International Construction Company and the stockholders."

Oscar B. Zwietusch died in July, 1910. Mr. Durant, the attorney for the defendants, testified that Zwietusch took the position that the lessors had a valid enforceable claim against the stockholders of the International Construction Company for the rent stipulated in the lease, and that the lessor would do no act or make no contract that would tend to weaken such claim. This contention on the part of Mr. Zwietusch was apparently based on the fact that the stock in the corporation had been illegally issued and that because of such illegal issue there was a personal liability on the part of the stockholders to the lessors.

Mr. Durant further testified that Mr. Zwietusch refused to accept an agreement from *Mr. Luehring* to be bound by

the lease, and that it was for this reason that the order of confirmation did not follow the order of sale by directing the execution of such agreement. This evidence was stricken out.

The receiver executed to *Luehring* a bill of sale conveying the property of the International Construction Company, and also executed an assignment of the lease to said *Luehring*. This assignment was not produced at the time of the trial, but the parol testimony was to the effect that there was no provision therein that the assignee should assume the terms and conditions of the lease or be bound thereby.

The reason given by Mr. Zwietusch for refusing to enter into an agreement with *Mr. Luehring,* as testified to by Mr. Durant, was that it would be foolish for him to do so when he had the opinion of his attorney, Mr. Hoyt, that *Washington Becker, George P. Mayer,* and other wealthy men were liable for the rent because they were stockholders in the International Construction Company.

The Wonderland Amusement Company was organized as a corporation in February, 1908, and on the 29th of that month *Luehring* conveyed to said corporation all of the property purchased at the receiver's sale. The defendants in the present action, except Kann and possibly *Luehring,* were stockholders in said company. This corporation went into possession of the leased premises at once and remained in possession thereof until the fall of 1908. On March 1st the defendant *Luehring* paid the sum of $500 on rent which became due the preceding 15th of February. The receipt given for this rent recited that the money was received from the International Construction Company by the hands of *George Luehring.*

On May 26, 1908, the Wonderland Amusement Company gave its check for $600 to apply on rent, and on June 2d its check for $400 to apply on rent. The Wonderland Amusement Company continued in possession of the property until September, 1908, when it became insolvent and made a vol-

untary assignment to the defendant *Naumann*. The corporation paid no more rent and made no further effort to use the premises, and they were not used until the summer of 1910, when the park was used as an amusement resort by three persons who leased the same from the predecessors in title of the plaintiffs on November 15, 1909. Before this lease was entered into, an agreement was made between the lessors and the shareholders in the International Construction Company whereby the latter consented to release all liens on the property covered by the lease of 1904, and agreed that the lessors might lease the property to third parties from time to time at an annual rental of not less than $2,000, without prejudice to the rights or claims of the lessors against any persons liable upon or under the original lease, if any such liability existed, provided that there should be credited on the rent reserved in the original lease, $2,000 per year. This agreement was signed by the stockholders of the International Construction Company and by all of the defendants or their agents, excepting the original lessee, Kann.

During the pendency of the voluntary assignment proceedings it was suggested to the lessors that they file a claim for rental against the corporation. They refused to do so, assigning as a reason that such claim might be construed as a waiver of the claim against the stockholders of the International Construction Company, or might interfere with the lessors' right to hold the stockholders of that company personally liable on the lease.

In this proceeding the lessors filed a verified statement admitting the appointment of a receiver for the International Construction Company, and that such receiver was authorized to sell the property of the corporation and did so to the defendant *Luehring;* that said *Luehring* did not enter into an agreement approved by the court with the lessors to assume and agree to pay the rent provided in the lease and to perform all the conditions and covenants thereof; that the lessors

dence. There is no reason that we can perceive why that rule should not have its full effect in this case. It is one where observance of the witnesses and listening to their testimony is generally very helpful in arriving at the right of a controversy. All the indications are that the trial court came to the conclusion which it did with full appreciation of the law that a person who, in general, is insane, may bind himself by contract made during a lucid interval rendering him capable of appreciating the nature of his acts and exercising judgment in respect thereto.

By the Court.—The judgment is affirmed.

A motion for a rehearing was denied, with $25 costs, on February 24, 1914.

ZWIETUSCH, Administratrix, and others, Respondents, vs. LUEHRING and others, Appellants.

November 20, 1913—February 24, 1914.

Receivers: Judicial sale of leasehold interest: Obligations assumed by purchaser: Statute of frauds: Purchase by one for benefit of others: Landlord and tenant: Assignment of lease: Liability of assignee: Consent of lessor: Surrender and re-entry: Giving option to purchase: Actions: Election of remedies: Estoppel: Waiver: Evidence: Competency: Witnesses: Transactions with persons since deceased: Parol evidence to explain judicial order: Appeal: Error must affirmatively appear.

1. An order for the sale by a receiver of the interest of an insolvent corporation in a lease of an amusement park provided that upon the sale being made and confirmed the purchaser should execute a contract assuming the obligations of the lease and agreeing to pay the rent reserved therein; the notice of sale stated that the "interest and liability as lessee" of such corporation would be sold; and the receiver's report of sale and the order of confirmation recited that the sale had been made in conformity to the order of sale. *Held*, that the purchaser

at the sale, being chargeable through his attorneys, if not personally, with knowledge of the contents of such order and notice of sale, was liable for the rent thereafter accruing on the lease, he having taken possession of the premises and assigned the lease to a corporation, although he did not execute any contract assuming the obligation of the lease and neither the report of sale nor the order of confirmation made any specific reference to such condition or requirement.

2. The fact that the receiver's report of sale stated that he had executed a deed to the purchaser before confirmation, which was contrary to the order of sale, and that such report was confirmed, would not relieve such purchaser from the liability assumed when he made the purchase; nor could the purchaser escape the burdens then assumed by obtaining possession of the deed and then refusing to enter into a contract as directed by the order of sale. The statute of frauds has no application to such a situation.

3. Although a lease in terms requires the lessor's consent to an assignment thereof, such consent is not required where the assignment is by operation of law, as in the case of a judicial sale.

4. Where a lease provided that an assignment should not release the party assigning, though consented to by the lessor, but that in such case both assignor and assignee should be liable, a statement by the lessor, at a receiver's sale of the leasehold interest, that he had no objection to the sale but would do nothing to jeopardize his claim against the stockholders of the corporation whose assets were being sold, could not be construed as a refusal to consent to the transfer.

5. The lessor having been given no opportunity to accept the written obligation of the purchaser, a mere statement by him after the sale that he would be a fool to take such obligation when he had an opinion from his attorney that wealthy men, stockholders in said corporation, were liable to him, would not amount to a refusal to assent to the transfer, especially when made in ignorance of the fact that the men referred to were among the real purchasers.

6. The remedy, if any, against stockholders of the insolvent lessee was not inconsistent with holding the subsequent assignees or purchasers of the lease for the rent; hence there was no election by the lessor between inconsistent remedies.

7. Where by the terms of a receiver's sale of corporate property, including a leasehold interest in land, the purchaser was required to assume the obligations of the lease, and one stock-

holder, pursuant to a reorganization agreement, purchased the property for the benefit of himself and other stockholders, all of such associates became bound by the obligation assumed.

8. A change of position by one person in reliance upon the conduct of another is essential to an estoppel *in pais*.

9. Waiver is the intentional relinquishment of a known right, benefit, or advantage.

10. Where the facts and circumstances relating to the subject are admitted or clearly established, waiver becomes a question of law, but if different inferences may be drawn from the evidence a question of fact is presented.

11. Acts of the lessors of property, after a receiver's sale of the lease, nominally to an individual purchaser who in fact represented responsible associates, evincing an unwillingness to recognize such nominal purchaser as tenant, all of which acts were done in ignorance of their claim against such associates, do not amount to a waiver of such claim.

12. In an action to charge the real purchasers of a leasehold with the rent reserved in the lease, the legal proceedings in which the sale was ordered, the agreement between the nominal purchaser and the other defendants, and their organization of a corporation to take over the lease, were all competent evidence.

13. In an action by heirs of a lessor to recover rent from alleged assignees of the lease, a defendant who took the assignment in his own name though in fact for the benefit of himself and his codefendants, all of whom were stockholders in a corporation which they sought thereby to reorganize, and who, in turn, transferred the same to a new corporation organized by them,—was incompetent under sec. 4069, Stats., to testify to a conversation with the deceased lessor, although he claimed to hold his stock merely as agent of a lumber company of which he was a stockholder and officer.

14. In such action, statements made by the attorney of the deceased lessor to one of the defendants in the presence of the lessor, would be immaterial unless concurred in by the client, and if concurred in that fact could not be shown by such defendant.

15. Under sec. 3072*m*, Stats., error to justify reversal must affirmatively appear to have been prejudicial to the appellant, and this does not appear from the exclusion of evidence, when the court is not advised what was intended to be shown by the witness nor how it would affect the rights of the parties.

16. An order of court cannot be explained by evidence of a conversation between an attorney of one of the parties and the presiding judge.

17. Where the assignee of a lease became insolvent and failed to pay the rent, the leasing of the premises by the lessors to a third person at a reduced rental before the expiration of the term, under an agreement with the assignors that it should not "prejudice or affect in any way the rights or claims of the lessors against any of the parties liable upon or under the original lease" if any liability existed thereunder, did not amount to a surrender of the lease or a re-entry of the lessors and did not release the parties so liable, but they were entitled to credit for the rent received.

18. An option to purchase the leased premises given by the lessor to a third person, without any mention of the lease, which option was never accepted and never became a binding contract, did not constitute a re-entry so as to relieve the lessee from the payment of rent.

APPEAL from a judgment of the circuit court for Milwaukee county: ORREN T. WILLIAMS, Circuit Judge. *Affirmed.*

This action was brought to recover rent alleged to have accrued from and after August 14, 1908, to the amount of $9,000. A verdict was directed for the plaintiffs, and from a judgment entered thereon defendants appeal.

The lease was made between plaintiffs' predecessors in title and one Richard C. Kann, on November 15, 1904, for a period of ten years, at an annual rental of $4,000. The lease provided that the lessee might assign it, provided the assignee should at the time of the assignment execute and deliver to the lessor a written instrument agreeing to pay the rent reserved in the lease and to perform all the conditions, covenants, and agreements thereof. It further provided that such assignment should not release the lessee, but that he should remain personally liable in the event of an assignment. It also recited that any subsequent assignment should be made only on the same terms and subject to the same conditions as were provided for in reference to the first assignment. It further provided that the leased premises should be used for an amusement park, and that the lessee should expend in buildings and improvements thereon the sum of $75,000 be-

time avail himself of all the advantages acquired by the purchase. The statute of frauds has no application to this situation.

But it is argued that the lessors refused to consent to the sale or transfer of the lease to *Luehring* and refused to recognize the validity of such transfer, and therefore the obligation to assume liability for the rent did not become effective.

There are two answers to this contention. In the first place it was not essential that the lessors should give such assent, and in the second place the evidence fails to show that they withheld it.

By its terms this lease was not assignable without the consent of the lessors in writing, and this no doubt was the reason why the order of sale provided for consent on the part of the lessors. But, notwithstanding this provision in the lease, it was assignable by operation of law whether the lessors gave their consent or not. See 18 Am. & Eng. Ency. of Law (2d ed.) 661, where many of the cases so holding are collected.

If the lessors thought they could prevent the purchaser at the sale from taking the benefit of his purchase by refusing assent thereto, they were simply mistaken as to what their legal rights were. If the purchaser desired to avail himself of such benefit it was his duty to do the things which he was required to do, regardless of the attitude of the other party, and so long as he did them his rights would be protected regardless of the position taken by the lessors. The law settled the rights and obligations of the parties, and protests on the part of either party would not be of much avail. The lessors might protest against the validity of the assignment, but so long as the assignees took possession of and used what they bought, such protestations did not change the legal status of the parties.

In the next place, we hardly think that there was more than a mere scintilla of evidence to show that the lessors would re-

fuse to approve of the agreement provided for in the order of sale, and it is certain that they were not given any opportunity to do so and that the purchaser did not propose to run the risk of giving any such opportunity so long as he got the benefit of his purchase and could avoid doing so.

It is undisputed that the lessors were in consultation with an able attorney and that it was at his suggestion that the order of sale was so worded that the purchaser thereat would become bound by the covenants of the lease. One of the lessors appeared at the sale and stated in substance that he had no objection thereto, but would do nothing that would jeopardize a claim they were making against the stockholders of the International Construction Company. It has not been suggested that such consent could affect such claim, and we fail to see how it could. The persons who would become liable beyond any question for future rent, if the agreement provided for in the order of sale was carried out, were the very persons whom Zwietusch desired to hold on their stockholders' liability because they were solvent and able to pay, although the evidence does not show that Zwietusch was aware that any one except *Luehring* would be liable. There was every reason why the lessors should, after they had time to ascertain what their legal rights were, consent to the transfer by the receiver which was so manifestly to their advantage, and no conceivable reason why they should not, or why they should reject the provisions inserted in the order of sale for their benefit and because their attorneys insisted on it. Mr. Zwietusch died before this action was commenced, and we have no line on his mental caliber, further than that the lease was carefully prepared to conserve and protect the rights of the lessors and that they employed attorneys to advise them when the Construction Company stranded. Now the only evidence tending to show that the lessors would not assent to a contract such as that provided for in the order of sale is that given by Mr. Durant, in which he undertook to detail some conversa-

tions had with Zwietusch after the sale took place. The substance of these conversations as summed up by Mr. Durant was that Zwietusch had no objection to the sale so long as he did nothing to waive his claim against the stockholders of the International Construction Company. This certainly was not a declination to assent to the contract provided for when it was tendered for approval. It was also testified by Mr. Durant that Zwietusch said that he (Durant) must think him a fool if he would accept an agreement from *Luehring* to be bound by the sale of the lease, as he had an opinion from his attorney that *George P. Mayer* and *Washington Becker* and other wealthy men were liable for the rent. If this statement was made, it was of course made in ignorance of the fact that *Luehring* made the purchase for himself and these same men who would be bound equally with him for the performance of the agreement, and it must also have been made under the unfounded belief that the acceptance of the agreement might waive an existing claim for rent. The lease very carefully provided that the lessee and each assignee should be liable for all rent reserved therein. There was no advance refusal to assent to the transfer of the lease to the defendants, and defendants carefully refrained from giving the opportunity to consent.

It is not claimed that *Luehring's* codefendants, except Kann, were not bound under their contract with him for the obligations which he assumed in purchasing the lease. It is clear that they were. *Kirschbon v. Bonzel,* 67 Wis. 178, 29 N. W. 907; *Woolsey v. Henke,* 125 Wis. 134, 103 N. W. 267; *Hodges v. Nalty,* 104 Wis. 464, 80 N. W. 726; *Northern Nat. Bank v. Lewis,* 78 Wis. 475, 47 N. W. 834.

We think that *Luehring* and his associates became obligated to perform the covenants of the lease under the transfer to them, by operation of law. Such being the case, the subsequent assignment of it to the Wonderland Amusement Company did not relieve them of the obligation to pay rent accru-

ing after the assignment was made, unless the lessors in some way lost the right which accrued to them upon the assignment being made to *Luehring*. This question has been discussed at considerable length because it was the one argued at greatest length at the bar and because the case is an important one. The foregoing view renders it unnecessary to decide whether in any event, where there is a transfer of such a lease as is here involved by operation of law, the purchaser does not assume the covenants of the lease.

Construing the order of confirmation as we do, there is no merit in the contention that this action is a collateral attack on a final order of the court.

3. There was no election between inconsistent remedies by the lessors. The remedy against the stockholders of the Construction Company was not inconsistent with holding subsequent assignees or purchasers of the lease. Every transfer made in the manner provided for by the lease furnished added security for the rent still to become due, and released none of those already liable.

4. Neither was there any estoppel *in pais*. The record fails to show that the lessors ever did any act or thing which misled the defendants or induced them to do anything to their disadvantage which they would not otherwise have done. A change of position by one in reliance upon the conduct of another is essential to create an estoppel *in pais*. *Somers v. Germania Nat. Bank,* 152 Wis. 210, 219, 138 N. W. 713; *Ady v. Barnett,* 142 Wis. 18, 23, 124 N. W. 1061; *Mabie v. Matteson,* 17 Wis. 1, 12; *Norton v. Kearney,* 10 Wis. 443; *Chynoweth v. Tenney,* 10 Wis. 397; *Racine Co. Bank v. Lathrop,* 12 Wis. 466.

5. The question of waiver is perhaps the one on which the most stress was laid, aside from that first discussed. It is about as difficult to lay down any hard-and-fast rule as to what constitutes waiver as it is in reference to what constitutes negligence. We have definitions of both terms, but it is often

hard to determine what cases fall within the definition and what without. Each case must be decided on the facts peculiar to it. Waiver is the intentional relinquishment of a known right, benefit, or advantage. *Swedish Am. Nat. Bank v. Koebernick,* 136 Wis. 473, 479, 480, 117 N. W. 1020, and cases cited; *Voss v. Northwestern Nat. L. Ins. Co.* 137 Wis. 492, 118 N. W. 212; *Pabst B. Co. v. Milwaukee,* 126 Wis. 110, 105 N. W. 563; *Fraser v. Ætna L. Ins. Co.* 114 Wis. 510, 523, 90 N. W. 476. There is no dispute about the facts which it is claimed constitute the waiver, and counsel on both sides insist that the evidence did not present a jury question. It is said in *Swedish Am. Nat. Bank v. Koebernick,* 136 Wis. 473, 480, 117 N. W. 1020, that "where the facts and circumstances relating to the subject are admitted or clearly established, waiver becomes a question of law." But if different inferences may be drawn from the evidence, a question of fact is presented "to be determined by court or jury, according as parties see fit to submit the controversy for decision." *Fraser v. Ætna L. Ins. Co.* 114 Wis. 510, 524, 90 N. W. 476.

The matters relied on to show waiver are the following: (1) Statements made by Oscar B. Zwietusch at the time of the receiver's sale and thereafter, to the effect that he would not consent to any assignment or transfer of the lease that would jeopardize his claim against the stockholders of the International Construction Company. (2) Insistence by Zwietusch that receipts evidencing payments of rent after the receiver's sale run to the International Construction Company. (3) Refusal by the lessors to file a claim for rent against the Wonderland Amusement Company after it became bankrupt. (4) An answer filed by the lessors in the receivership proceedings arising out of the failure of the Wonderland Amusement Company, in which it was stated that *George F. Luehring* did not comply with the terms of the order of sale by accepting the lease in the manner therein provided, and that he did

not thereafter by a written instrument assume or agree to pay the rent and to perform the other conditions of the lease. It was further recited in said answer that the lessors did not consent to the assignment, transfer, or sale by the receiver to *Luehring.* (5) In an action brought by the lessors against the incorporators of the International Construction Company, it was alleged that *Luehring,* with the knowledge and consent of the defendants in that action, entered into possession of the premises and continued in possession, and paid the rent reserved in the lease to August 14, 1908, and plaintiff on information and belief stated that the lessors named in the lease did not consent *in writing* to the assignment of said lease to said *George F. Luehring.* (6) The making of a lease of part of the premises in 1909 to Mrs. Hopkins and others. (7) The giving of an option to the city of Milwaukee in 1911 to buy the property, coupled with a form of contract which the lessors agreed to execute if the option was accepted, which proposed contract recited that the property would be conveyed free and clear of all liens and incumbrances. (8) The delay in commencing this action.

This looks like a rather formidable list, and at first blush it might be thought that an inference of waiver might be drawn from the facts and that the jury was the proper party to draw such inference if it saw fit, although the parties to the action apparently did not desire to have the question submitted. We might discuss the evidence in detail pertaining to these various questions and show that none of them had much force, and most of them none whatever. There is one vital proposition that extends to all of them in so far as they tend to show waiver: We are unable to find any evidence in the record tending to show that the lessors or their predecessors in title, prior to the time this action was commenced, knew of the agreement under which *Luehring's* codefendants, except Kann, were in fact parties to the purchase at the receiver's sale and would be liable for the rent reserved in the

lease. It is very evident that Oscar B. Zwietusch did not know of the existence of the agreement between the defendants when he told Durant that he would do nothing that would waive a claim against the responsible stockholders in the Construction Company like *Becker* and *Mayer*. These were the men who would be liable if the terms of the order of sale in reference to making a contract had been carried out. Surely he would be willing to accept this express contract to do what he proposed to force them to do by a proceeding the result of which was at least somewhat doubtful. There is no evidence that he was informed of the agreement up to the time of his death, or that any of the other lessors were so informed. We entertain no doubt that had these parties presented a contract to the lessors by which they agreed to assume the covenants of the lease, it would have been entirely satisfactory. What the lessors did not know, as far as the record discloses, is that they had a claim against these defendants by virtue of the *Luehring* purchase, because they did not know that any one but *Luehring* was responsible for the fulfilment of the obligation assumed by him when he purchased the lease. It is true that Zwietusch was a stockholder in the Construction Company and attended some of its meetings. But he was not a party to the reorganization scheme, and it does not appear that the final arrangement entered into between those who were was brought to his notice, or even that he knew of the existence of the contract of November 19, 1907. The defendants relied on the defense of waiver, and the burden was on them to show it. Unless a known right was relinquished there was no waiver. The lessors might object to *Luehring* taking an assignment of the lease and assuming liability for its covenants, and at the same time be entirely willing that he and his codefendants should do so.

The right acquired by the lessors under the sale and transfer of the receiver was a valuable one. By virtue of it solvent

lessees succeeded an insolvent one. The lessors wanted the stipulated rent, not the possession of the premises. Men ordinarily do not throw away valuable and secure rights in order that they may pursue uncertain ones, and it is only in very rare cases that valuable and certain rights are wantonly thrown away when there is no necessity for doing so in order to preserve other existing rights.

7. It is urged that the court erred in admitting evidence (a) tending to show the negotiations between the defendants which led up to the purchase made by *Luehring* at the receiver's sale; (b) tending to show the formation of the Wonderland Amusement Company and the assignment and transfer to it by *Luehring* of the property bought at the receiver's sale and its subsequent use of the property; and (c) in receiving in evidence the proceedings had in the case of Scholl v. International Construction Company, and particularly the order of sale made therein.

The evidence was competent. The most important facts that it tended to show, namely, that *Luehring* acted as the agent and representative of the other defendants, except Kann, in making the purchase and subsequent transfer, and that they were liable for any obligation which he assumed in making the purchase, are practically admitted by the pleadings. It was proper to get the whole transaction before the court and jury. The evidence does not show that there was anything meretricious about the arrangement of the defendants to secure the property and finance and carry on the undertaking. But the carrying out of a reorganization scheme may bring on unanticipated troubles, as will be seen by a reference to *Northern Pac. R. Co. v. Boyd,* 228 U. S. 482, 33 Sup. Ct. 554.

8. There are a number of errors assigned on the exclusion of evidence which have been considered and which need not be treated in detail. The most important arise out of the refusal of the court to permit the witness *Luehring* to testify

(a) to conversations with Oscar B. Zwietusch, deceased; (b) to declarations of the same person; (c) to a conversation with Mr. Hoyt, the attorney for Zwietusch, had in the presence of the latter, and (d) a conversation between Durant and Judge TARRANT relative to the order of confirmation.

(a) The first class of questions were, we think, properly excluded under sec. 4069, Stats. *Luehring,* it is true, testified that he was not a stockholder in the International Construction Company and that he was simply representing the Hilty Lumber Company, a corporation of which he was secretary, which company held stock in the International Construction Company. It is none the less true that he was apparently the most active of those who formulated and carried out the reorganization plan. It is also true that as a stockholder in the Hilty Lumber Company he would have to share in its losses, and that when the agreement of November 19, 1907, was entered into he signed the same, representing that he was the owner of ten shares of the capital stock of the International Construction Company, and further, that he was elected secretary and treasurer of the Wonderland Amusement Company. The witness is here a party to the action, which was not the case in *Hanf v. Northwestern M. A. Asso.* 76 Wis. 450, 452, 45 N. W. 315, or *Laack v. Runge,* 104 Wis. 59, 60, 80 N. W. 61, and we do not think it can be said that he is a mere nominal party, because he has a financial interest in the controversy. It would also seem that if he were only a mere agent of his codefendants, having purchased the lease in his own name and transferred it pursuant to their direction, he is a person through or under whom the persons offering his testimony derive their title or sustain their liability within the meaning of sec. 4069.

(b) There was no prejudicial error in refusing to permit *Luehring* to testify to the declaration made by Zwietusch at the time of the sale, if there was any error in doing so. This declaration was proven by two other witnesses called by

defendants, one of them being their attorney, and such evidence is undisputed and for the purposes of this appeal assumed to be true.

(c) *Luehring* testified that he was advised by his attorney during the fall of 1907 that it was necessary to determine the relations that would exist between the lessors and himself and the other defendants or any other person who might take over the park, and that he had a conference in reference to this matter with Mr. Hoyt and Mr. Zwietusch. He was then asked to relate the conversation had with Mr. Hoyt. Objection was made and sustained to this as incompetent and irrelevant and as coming within the statute. This ruling is said to be proper under the decision of this court in *Holway v. Sanborn,* 145 Wis. 151, 130 N. W. 95. That case does not so decide. It involved the question of whether, where the deceased and another carried on a conversation in the presence of a third party who did not participate therein, such third party might testify to what the deceased said. Here the question called for what Mr. Hoyt said, and he was very much alive at the time of the trial. Mr. Hoyt's statement made in the presence of his client would not cut much figure if it was not concurred in by the client, and this fact could not be shown. We are not advised what it was intended to show by the witness, and it is not apparent how it could affect the liability assumed long thereafter by reason of the purchase at the receiver's sale. Under sec. 3072*m,* Stats., we may not reverse for error unless it affirmatively appears that the error not only harmed the appellants, but harmed them so materially that the result might probably have been different had the error not occurred. *Koepp v. Nat. E. & S. Co.* 151 Wis. 302, 139 N. W. 179; *Adams v. Bucyrus Co.* 155 Wis. 70, 143 N. W. 1027. There is no such showing of prejudicial error here.

(d) Any conversation which Mr. Durant had with the late Judge TARRANT in reference to the order of confirmation

could not be material on the issues before the court. The order speaks for itself. If Mr. Durant had been called on to explain his conduct in the matter, the evidence might be proper enough. However, no one was attacking his conduct and he was not on trial, and the evidence excluded was clearly incompetent.

9. On November 15, 1909, the plaintiffs leased the premises in question, or part of them, to one Mrs. Hopkins and her associates. It is argued that an actual surrender of possession by the lessee and the leasing of the premises by the lessors to a third party amount to a surrender of the lease and a re-entry by the lessors, and that if this result did not follow as a matter of law, the evidence at least presented sufficient facts to warrant a jury in finding a voluntary surrender and acceptance thereof and a re-entry by the lessors. This question affects to some extent the amount of damages recoverable in this action. We think the trial court was right in the conclusion which it reached. Manifestly it was for the advantage of the defendants that this lease be made, as their grantee had become insolvent and had abandoned the premises, and any amount received for rent would mitigate the damages that might otherwise be recoverable. Before this lease was made, the matter of making it was submitted to the defendants, and a written agreement was entered into between them and the lessors, in which the defendants agreed that the lessors might lease the land in question at an annual rental of at least $2,000, and in which they further agreed that the making of such lease should not "prejudice or affect in any way the rights or claims of the lessors against any of the parties liable upon or under said original lease," if any liability existed thereunder. This agreement recited that the signers were stockholders in the International Construction Company. But they were the defendants in this action and expressly agreed that the making of the lease should not prejudice the rights of the lessors against *any* of the parties who

were liable under the original lease. This contract is very plain in its terms and we think the defendants should be bound by it.

It is also claimed that it should be held that there was a re-entry by virtue of the option which was given to the city of Milwaukee to purchase the premises in 1911. The nature of this option is set forth in the statement of facts. The option was never accepted and never became a binding contract to sell, and we do not think the evidence would warrant a jury in finding that the giving of it constituted a re-entry so as to relieve the defendants from the further payment of the rent.

By the Court.—Judgment affirmed.

A motion by the appellants for a rehearing was denied, with $25 costs, on February 24, 1914.

STATE EX REL. WISCONSIN TRUST COMPANY and others, Trustees, Respondents, vs. LEUCH, City Clerk, and others, Appellants.

November 21, 1913—February 24, 1914.

Taxation: Exemptions: "Stock of any corporation in this state," etc.: Foreign corporations: Statutes: Construction.

1. While it is a general rule that statutes exempting property from taxation are to be strictly construed, that rule comes into play only when ambiguity appears.
2. A foreign corporation having property and agents and carrying on business in this state is "in the state," within the meaning of the statute (sec. 1038, Stats.) classifying corporations for the purpose of exempting from taxation their shares of stock.
3. The words "any corporation," in sub. 9 of said sec. 1038, mean every corporation, foreign or domestic, limited only by the requirements that it be in the state and that its property be taxed in the same manner as that of individuals.

4. The legislation of a state is presumed to be regulatory of persons and property in that state unless otherwise expressed.
5. The provision of said sec. 1038, exempting "stock in any corporation in this state which is required to pay taxes upon its property in the same manner as individuals" (sub. 9), refers to its property in this state, and under it the shares of a foreign corporation which carries on a large department store in the state, has a large amount of property here, and is licensed to do business in the state, are not subject to assessment.

APPEAL from a judgment of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Affirmed.*

The appeal is from a judgment reversing upon *certiorari* the action of the board of review of the city of Milwaukee refusing to set aside certain assessments made against the relators as trustees of the estate of Nathan Hamburger.

For the appellants there were briefs by *Daniel W. Hoan,* city attorney, and *Garfield S. Canright,* assistant city attorney, and oral argument by *Mr. Canright.* They contended, *inter alia,* that the words "in this state" in the tax-exemption statute limited it to domestic corporations. Corporations have their residence and being and are located only in the states of their creation. *Bank of Augusta v. Earle,* 13 Pet. 519; *Shaw v. Quincy M. Co.* 145 U. S. 444, 12 Sup. Ct. 935; *Galveston, H. & S. A. R. Co. v. Gonzales,* 151 U. S. 496, 14 Sup. Ct. 401; *St. Louis v. Wiggins F. Co.* 11 Wall. 423; *Comm. v. Standard Oil Co.* 101 Pa. St. 119; *Humphreys v. State,* 70 Ohio St. 67, 70 N. E. 957, 65 L. R. A. 776; *Rhode Island H. T. Co. v. Tax Assessors,* 25 R. I. 355, 55 Atl. 877; *State v. Branin,* 23 N. J. Law, 484. Foreign corporations domiciled in Wisconsin are not required to pay taxes in the same manner as individuals. The statute means individuals in this state. These pay taxes on credits regardless of where they arise or whether due from residents of the state or elsewhere. Foreign corporations do not. *State ex rel. Dwinnell v. Gaylord,* 73 Wis. 316, 41 N. W. 521; *Buck v. Beach,* 206 U. S. 392, 27 Sup. Ct. 712; *Foster-Cherry C.*

Co. v. Caskey, 66 Kan. 600, 72 Pac. 268; *Chicago & N. W. R. Co. v. State,* 128 Wis. 553, 108 N. W. 557.

For the respondents there was a brief by *Glicksman, Gold & Corrigan,* and oral argument by *Nathan Glicksman.*

The following opinion was filed December 9, 1913:

TIMLIN, J. "Gimbel Brothers, Incorporated," during the times herein mentioned, was a corporation created by the law of Pennsylvania, owning and operating a department store in Philadelphia, and another at Milwaukee, Wisconsin. It owned real estate and personal property in both cities and was licensed as a foreign corporation to do business in Wisconsin. It was the successor of a copartnership of which the deceased Hamburger was a member, and upon incorporation and transfer of the copartnership property to it its shares of stock were issued to the several partners, including 4,500 shares of preferred stock and 4,750 shares of common stock to the deceased Hamburger. On June 23, 1912, the board of review confirmed an assessment against the relators as trustees of the estate of Hamburger on the stock above mentioned for the years 1909, 1910, and 1911 as omitted property. By ch. 588, Laws of 1911, it was clear that there could be no assessment for 1912 and none was made. It was made to appear that said Hamburger was a resident of the city of Milwaukee until his death on September 15, 1910. He died testate, his will was admitted to probate in the county court of Milwaukee county, the executors therein named entered upon the discharge of their duties, paid the inheritance taxes and completed the administration of the estate, and on April 10, 1912, the estate was assigned, final account allowed, and the executors discharged, but the will created certain trusts, and 4,430 shares of the preferred stock and 4,650 shares of the common stock aforesaid belonging in the estate were assigned upon those trusts, and the relators are trustees thereof.

The principal question argued is whether the shares of stock were assessable to the shareholders as personal property. If they were not, all the assessments must fail. If these shares were assessable, then we meet the question whether the assessments for 1909 and 1910, omitted during the lifetime of Hamburger, and the assessment of 1911, omitted during the executorship, can be assessed against the trustees after the discharge of the executors, the executors and trustees being the same persons. The decision of the case, we think, must turn upon the construction to be given to sub. 9 of sec. 1038, Stats. 1898. That section reads: "The property in this section described is exempt from taxation, to wit: . . . (9) Stock in any corporation in this state which is required to pay taxes upon its property in the same manner as individuals." The learned counsel for the appellants contends that this relates only to corporations of this state or domestic corporations, and to him this seems almost too clear for discussion, while to the learned counsel for respondents it appears with equal clearness that the provision in question relates to all domestic corporations and to all foreign corporations which could be said to be "in the state."

It may not be amiss to glance at the statute law as it existed on this subject at the time the statute now in force was enacted. By sec. 14 of ch. 18, R. S. 1858, it was provided: "The owner or holder of stock in any incorporated company which is taxed on its capital shall not be taxed as an individual for such stock." While this was in force ch. 130, Laws of 1868, was enacted. This last was a sort of a codification of the law of assessments and a classification of exemptions, following sec. 4 of ch. 18, R. S. 1858, and adding other exemptions, among them sub. 9 as follows: "Stock in any corporation in this state which is required to pay taxes upon its property in the same manner as individuals." These two statutes might be thought to cover the same case, or else that the elder included the stock of all foreign corporations and

the latter narrowed this down either to domestic corporations or to the latter and some class of foreign corporations. The act of 1868 contained a section repealing all acts in conflict therewith. But in the compilation of 1871 made by Judge Taylor he has in his ch. 18, p. 392, sub. 9 of sec. 2, inserted the above quoted law of 1868, and in his sec. 46 at page 405 the above quoted section of the Revised Statutes of 1858. The act of 1868 became sub. 9 of sec. 1038 of the Revised Statutes of 1878.

In the preface to their notes the revisers of 1878 state that they attempted to consolidate statutes relating to the same subjects, "reconciling incongruous provisions and purging them of redundancy and tautology." This they seem to have done with ch. 48, relating to the assessment of taxes. Of sec. 1038 of that chapter they say it is composed of several acts, but chiefly sec. 2, ch. 130, Laws of 1868. By that revision all of the Revised Statutes of 1858 not incorporated therein was repealed, the repeal going into effect November 1, 1878. And ch. 130, Laws of 1868, was also repealed. There was no intention to make any radical change in the law by this revision, and the revision of 1878, for this reason, indicates an understanding that there was a conflict between these provisions and that the elder was repealed by the general repealing clause found in the act of 1868. Comparing the act of 1868 with the provisions quoted in the Revised Statutes of 1858, it will be observed that there is an obvious narrowing of the class of corporations included and a narrowing of the description of the taxation which will bring about the exemption of the shares, but otherwise no change. The words "taxed on its capital" clearly mean not its capital stock but its property. So the statutes are alike in this respect. "Taxed on its capital" and "required to pay taxes upon its property" are equivalent expressions and each refers to taxes laid by this state. But "any corporation in this state" is narrower than "any incorporated company," by the

qualifying words "in this state," and "taxes upon its property in the same manner as individuals" is narrower than "taxed upon its capital," by the qualifying words "in the same manner as individuals." So the effect of the exemption of 1868 is to narrow the class entitled to such exemption in two particulars, namely, the corporation must be one which is "in this state," and it is no longer sufficient that it be taxed upon its capital; it must be taxed "in the same manner as individuals." This creates two classes: one where the property thereof within this state is taxed in the same manner as individuals; the other where it is not. *State ex rel. Weller v. Hinkel,* 136 Wis. 66, 116 N. W. 639. How can we say that the intention was to limit the exemption only to domestic corporations? The statute says "any corporation." The distinction between foreign and domestic corporations is so obvious and the words commonly employed to express that distinction so familiar to all that it would seem that if it were the intention of the legislature to confine the act of 1868 to domestic corporations it would have employed these familiar terms.

It is argued by appellants' counsel that a foreign corporation could not be "in the state," and therefore such corporation is not included. Argumentative statements from some of the opinions of the supreme court of the United States delivered during the period of transcendentalism relative to this subject are quoted to support the conclusion that a foreign corporation could not be in a state other than the state of its creation. Such sayings, while worthy of great deference, are not in themselves law, and are often, when detached from the subject of discussion, quite misleading. For instance, TANEY, C. J., says in *Bank of Augusta v. Earle,* 13 Pet. 519: "It must dwell in the place of its creation and cannot migrate to another sovereignty." This and like sayings are made the basis of appellants' argument. Much depends upon what Chief Justice TANEY meant by the words "dwell" and "mi-

grate" and more upon whether he meant merely that the corporation could not do these things *ex proprio vigore*. It is an every-day experience that foreign corporations come into this state with the consent of and under the laws of this state and are licensed to exercise their principal corporate powers here, and such exercise is upheld as a legal and sufficient exercise. It is a mere *petitio principii* to say that such powers are exercised here by agents for the corporation. So are its powers always exercised within its home state. It may, it is true, if this state permit it, have an agent in this state with powers so narrow that he does not represent the corporation except for very limited purposes, but it is for this state law to say how far he will represent the foreign corporation as a condition of permitting the corporation to act at all. Indeed, the state, generally speaking, has power in all cases to declare what acts shall constitute an agency, and the person, natural or artificial, who thereafter does these acts thereby creates such agency. A foreign corporation can exist as a legal entity, *i. e.* a juristic person, only in the state of its creation, because when it gets outside the realm in which the law bestowing this quality upon it has force there is nothing to uphold its juristic personality. This weakness may be overcome in whole or in part either by comity of the other state or by express or implied legislative authority of such other state, and when the foreign corporation is recognized as a suitor in court, as a grantor in a conveyance, as having acquired a title by adverse possession, as having capacity to sue or be sued, and as responsible for its wrongs or breaches of contract, there is a recognition of juristic personality present in such state, consequently the foreign corporation is "in the state" for some purposes. That a foreign corporation may be "within" this state was decided in *Great Northern R. Co. v. McCord,* 143 Wis. 589, 128 N. W. 432.

Speaking of a foreign corporation and its relation to a state other than that of its origin in *Herndon v. C., R. I. &*

P. R. Co. 218 U. S. 135, 158, 30 Sup. Ct. 633, Mr. Justice DAY says: "The corporation was within the state." The statute under consideration, set forth in a foot-note at page 147, contains the words: "Every railroad corporation in this state," and it was not doubted that it applied to foreign corporations. The Fourteenth Amendment to the United States constitution prohibits the state from denying to any person within its jurisdiction the equal protection of the laws. Would not this apply to a licensed foreign corporation? *Southern R. Co. v. Greene,* 216 U. S. 400, 30 Sup. Ct. 287. And how could a licensed foreign corporation be within the jurisdiction of the state and not within the state? And see *Ex parte Schollenberger,* 96 U. S. 369, 375. See the language used in the following cases consistent only with the view that a corporation, although domiciled or resident in one state only, may be "in" many other states: *Relfe v. Rundle,* 103 U. S. 222, 225; *Hooper v. California,* 155 U. S. 648, 15 Sup. Ct. 207; *Canada S. R. Co. v. Gebhard,* 109 U. S. 527, 3 Sup. Ct. 363; *State ex rel. Drake v. Doyle,* 40 Wis. 175, 194.

In England it is held that a foreign corporation which sets up an office and carries on one of the principal parts of its business in that country will be considered a resident of England. *Haggin v. Comptoir D'Escompte,* L. R. 23 Q. B. D. 519, 522. In Illinois the following rule was announced: "While the citizenship of the corporation would depend upon the place of the law of its creation, its residence might, manifestly, upon the principle above stated, be in any state where it was, by comity, permitted to exercise its franchise." *Bank of N. A. v. C., D. & V. R. Co.* 82 Ill. 493, 496. For the purpose of applying the statute of limitations a foreign corporation is considered a resident of the state in which it has an office and does business although not the state of its creation. *Wall v. C. & N. W. R. Co.* 69 Iowa, 498, 29 N.

W. 427; *Connecticut Mut. L. Ins. Co. v. Duerson,* 28 Grat. 630.

We do not need to go so far as to find a residence in this state in the present case. If the corporation is "in this state" for any purpose, the appellants' argument, in so far as it is based upon the impossibility of such condition, falls to the ground. A foreign corporation having property and agents and carrying on business in this state is "in the state" within the meaning of a statute classifying corporations for the purpose of exempting from taxation their shares of stock. It is said that statutes exempting property from taxation are to be strictly construed, and this is no doubt correct. But, as said by Lieber, the first requisite is honest construction, and that consists in impartially reviewing the writing without any bias for or against any particular meaning and without any preconceived purpose to bring about a particular result. If, viewed in this way and applied to the subject in hand, there is no double or ambiguous aspect of the words employed, there is nothing to do but declare the meaning in the same words employed in the writing or in their ordinary equivalents. Strict construction comes into play only after ambiguity appears. *St. John's M. Acad. v. Edwards,* 143 Wis. 551, 128 N. W. 113. So here the words "any corporation" mean every corporation, and that expression is limited only by the requirements that it be "in the state" and that its property be taxed in the same manner as that of individuals. This leaves for consideration whether the words "its property" mean all its property within this state or its property wherever situated. The state is legislating with reference to its own affairs and its own system and manner of taxation. It is highly improbable that it was intended that any time any one of the forty-eight states makes a change in the manner of taxing the property of its corporations this should affect exemptions of property in Wisconsin. Our statute relates to

the manner of taxation in this state. *State ex rel. Weller v. Hinkel,* 136 Wis. 66, 116 N. W. 639. Therefore it must relate to the manner of taxing the property in this state belonging to the corporation. It must be borne in mind that domestic corporations and all other corporations "in the state" are by this statute grouped together and the same rule fixed for all of that group. Besides, the legislation of a state is presumed to be regulatory of persons and property in that state unless otherwise expressed. Black, Interp. of Laws (2d ed.) pp. 91, 92, and cases cited.

The statute in question including *any* corporation must include a foreign corporation which is for the purpose of taxation in this state. Indeed, that is the change made by the act of 1868. The exemption is limited to the shares of domestic corporations and to the shares of foreign corporations in this state, not foreign corporations generally, and to these two classes only when their property in this state is by the laws of this state taxed in the same manner as individuals. The fact that the property of the foreign corporation is taxed outside of this state is not sufficient to exempt the shares. *Ogden v. St. Joseph,* 90 Mo. 522, 3 S. W. 25; *Bradley v. Bauder,* 36 Ohio St. 28; *Sturges v. Carter,* 114 U. S. 511, 521, 5 Sup. Ct. 1014. The corporation in question carries on a large department store in this state and has upwards of $2,000,000 of its property in the state and is licensed to do business in the state, therefore a corporation in this state; its property in this state is taxed in the same manner as individuals, hence its shares are not subject to assessment.

By the Court.—Judgment affirmed.

A motion for a rehearing was denied, with $25 costs, on February 24, 1914.

ZARTNER, by guardian *ad litem*, Appellant, vs. GEORGE and another, Respondents.

October 31, 1913—February 24, 1914.

Negligence: Acts not obviously dangerous: Evidence: Custom and usage: Leaving slacking lime uncovered: Lawful work on private property: Attractiveness to children: Liability for injury to trespassers: Questions for jury.

1. Where an act which was not obviously dangerous but which resulted in injury is alleged to have been negligent, evidence of custom is admissible for the purpose of showing whether or not the act was done as it is usually done under the same or similar circumstances, and thus to aid in determining its character.
2. In such case it is not necessary that either party should have known what the custom was at the time the alleged negligent act was done.
3. It was not an obviously dangerous act to leave uncovered and unfenced a mortar box filled with lime and water over which was spread a thin layer of sand, where such box was upon private property near a building which was being erected and so far from the sidewalk as not to affect travel thereon or be a source of danger to those who remained on the sidewalk or street, even though the box and a neighboring sandpile were attractive to children, who were in the habit of playing about the place.
4. It appearing that it was customary and even necessary at that season of the year to leave mortar boxes in which lime was slacking in the condition in which the box in question was left, a verdict for defendants was properly directed in an action for injury to a boy about seven years old who went upon the premises to play, jumped into the box, and sustained serious burns on his feet from the hot lime.
5. Liability for injury to trespassers on private property should be limited to cases where the act complained of partakes of the nature of gross negligence, obviously endangering the safety of others, or to active negligence committed at the time of injury.
6. The owner of private premises may safely, so far as trespassers are concerned, engage in any lawful ordinary work thereon and conduct it in a customary manner without incurring liability, even though some danger to them may reasonably be anticipated from the condition of the premises created by so conducting his work.

TIMLIN, J., dissents.

APPEAL from a judgment of the circuit court for Milwaukee county: ORREN T. WILLIAMS, Circuit Judge. *Affirmed.*

Action for personal injury. The defendants, who were engaged in mason work in Milwaukee, shortly before they quit work on August 1, 1911, filled a mortar box with lime and water, over which they spread a covering of about two inches of sand, and left it in that condition uncovered and unguarded. It stood on a private lot near a building that was being erected. Plaintiff's testimony shows it stood from four to five feet back from the sidewalk, while that of the defendants is that it was from twenty to twenty-four feet in on the lot from the sidewalk. The box was about four feet wide, seven feet long, and fifteen or sixteen inches deep. Near it on the lot was a pile of sand. The plaintiff, a boy six years and ten months old at the time of his injury, and who lived in the neighborhood of where the box was located, with other boys went on to the lot to play, jumped into the box, and sustained serious burns on his feet from the hot lime before he got out.

The court admitted evidence to the effect that it was the custom of masons in Milwaukee and vicinity to leave mortar boxes situated as this was, unfenced and uncovered, and at the close of the evidence it directed a verdict for defendants. From a judgment entered thereon the plaintiff appealed.

The cause was submitted for the appellant on the brief of *Julius E. Roehr* and *C. H. Hamilton,* and for the respondents on that of *A. J. Hedding,* attorney, and *H. L. Kellogg,* of counsel.

VINJE, J. Was evidence of custom of leaving mortar boxes uncovered in Milwaukee properly received? In answering this question the distinction between proving a custom which is to affect or establish contract relations and a custom which affects, but does not necessarily determine, negligence, should be borne in mind. *Pier v. C., M. & St. P. R.*

Co. 94 Wis. 357, 68 N. W. 464. When evidence as to custom is introduced for the purpose of characterizing an act as negligent because not performed in the usual manner, or as non-negligent because so performed, a different rule prevails than when it is introduced for the purpose of affecting or establishing a contract relation. In the latter case it must be shown that the custom is so general and of so long standing that both parties must be presumed to have knowledge of it, and to have contracted with the understanding that it should apply to and affect their contract. *Lemke v. Hage,* 142 Wis. 178, 125 N. W. 440. In the former case it is not necessary that either party should know what the custom was as to how an alleged negligent act was done at the time it was done. Evidence thereof is received for the purpose of ascertaining whether or not the act was done as it is usually done under the same or similar circumstances, in order to aid the court or jury in correctly determining the quantum of negligence in the act complained of. *Nadau v. White River L. Co.* 76 Wis. 120, 43 N. W. 1135. It follows from this that if the act in question is obviously dangerous, then evidence of custom is inadmissible, because custom cannot change the quality of an act. It can only aid in determining what that quality is. Hence, when its quality clearly appears from the act itself, there is no need to invoke the aid of custom to determine it. Our court has consistently so held. *Innes v. Milwaukee,* 96 Wis. 170, 70 N. W. 1064; *Leque v. Madison G. & E. Co.* 133 Wis. 547, 113 N. W. 946; *Bandekow v. C., B. & Q. R. Co.* 136 Wis. 341, 117 N. W. 812; *West v. Bayfield M. Co.* 144 Wis. 106, 128 N. W. 992; *Jensen v. Wis. Cent. R. Co.* 145 Wis. 326, 128 N. W. 982; *Merton v. Mich. Cent. R. Co.* 150 Wis. 540, 137 N. W. 767; *Krawiecki v. Kieckhefer,* 151 Wis. 176, 138 N. W. 710.

In the case at bar the evidence of custom was properly admitted for the purpose of aiding the court or jury in determining the character of the alleged negligent act, which can-

not be said to have been obviously dangerous, taking into consideration the fact that the mortar box was located on private property some distance from the street. For it matters not whether the plaintiff's or the defendants' evidence is true as to the location of the box. In either case it was far enough from the sidewalk not to affect public travel thereon or to be any source of danger to those who remained on the sidewalk or street. The evidence shows that the custom of leaving mortar boxes uncovered in the summer time was general, not only in Milwaukee but in the vicinity thereof, and it was proper to receive such evidence.

The only other matter for consideration is, Should the court have submitted the question of defendants' negligence to the jury? The evidence showed not only that it was the custom in Milwaukee and vicinity to leave mortar boxes, in the summer, as this was left, unfenced and uncovered, but it showed, without contradiction, that in the summer time it was necessary to leave them uncovered in order not to get the lime so hot that it would burn, and that it was likewise necessary to spread a thin coating of sand over them so that the lime would not get too soggy. It thus appears that in order to secure the right kind of slacking in the summer time it is necessary to leave the boxes uncovered and to put on a thin coating of sand. That being so, the only other way that now occurs to us in which the work could be properly done so as not to enable children to jump into the slacking lime would be to fence the mortar boxes in by an inclosure, boy proof, or else protect them on top by a secure wire netting—certainly no small task.

It is conceded that the box with the sand covering the lime and the adjacent sandpile were attractive to children, as is almost every object or appliance that can be mentioned. And the evidence showed, too, that children were in the habit of playing about the place where the work was carried on. In this respect it was subjected to no greater burden than places

in the vicinity of children usually are, for children are omnipresent, though lacking many of the attributes that should attend such a quality.

So we are squarely faced with the question whether or not a person may upon his own premises pursue a useful occupation in a usual and necessary manner which is not obviously dangerous to others, without incurring liability to trespassers, though he may reasonably anticipate that children may come in upon his premises, meddle with the work, and be injured? In other words, Shall the doctrine of the *Turntable Cases,* or of attractive nuisances, in its widest scope be applied to the conduct of ordinary business carried on in a customary manner upon private property? It has not yet so been applied in our state.

In *Klix v. Nieman,* 68 Wis. 271, 32 N. W. 223, the question arose as to whether the owner of a city lot upon which there was an unfenced and unguarded pond was liable in damages for the death of a boy who, while playing about the pond, fell in and was drowned. The court held there was no liability on the part of the owner. In that case Chief Justice COLE quotes from *Hargreaves v. Deacon,* 25 Mich. 1, where it was held that the owner of a cistern located upon his property was not liable for the death of a child of tender years who fell into it because it had been left uncovered, and then adds: "There is a class of cases which hold the proprietor liable for injuries resulting to children from dangerous machinery left unguarded and so exposed as to be calculated to attract their interference with it," citing *Railroad Co. v. Stout,* 17 Wall. 657; *Keffe v. M. & St. P. R. Co.* 21 Minn. 207; and *Koons v. St. L. & I. M. R. Co.* 65 Mo. 592. The *Klix Case* was quoted approvingly in *Gorr v. Mittlestaedt,* 96 Wis. 296, 71 N. W. 656, where it was held that the owner of a dangerous place near a highway, but far enough removed therefrom so that a traveler must necessarily wander from or pass wholly outside of the highway to become a trespasser in

order to reach it, was not liable for injuries sustained by a traveler who fell into the dangerous hole.

In *Busse v. Rogers,* 120 Wis. 443, 98 N. W. 219, the *Klix Case* is referred to with the statement that the doctrine of what are known as the turntable or attractive nuisance cases was not expressly approved or disapproved in the *Klix Case,* though the reasoning of the cases cited would seem rather opposed to the doctrine than otherwise. The question as to the soundness of the views of the *Turntable Cases* was expressly left open by the court in the *Busse Case* on the ground that it was not necessary to decide it, because in that case the attractive nuisance was located within the boundaries of a public street.

Counsel for plaintiff, in addition to *Busse v. Rogers, supra,* cite the following Wisconsin cases in support of their contention that defendants' liability should have been submitted to the jury: *Compty v. C. H. Starke D. & D. Co.* 129 Wis. 622, 109 N. W. 650; *Lomoe v. Superior W., L. & P. Co.* 147 Wis. 5, 132 N. W. 623; *Secard v. Rhinelander L. Co.* 147 Wis. 614, 133 N. W. 45; *Kelly v. Southern Wis. R. Co.* 152 Wis. 328, 140 N. W. 60; *Meyer v. Menominee & M. L. & T. Co.* 151 Wis. 279, 138 N. W. 1008. In all of these cases except the last, the attractive appliance or object was in a public street and the injury occurred thereon. In the last case, wires carrying a powerful electric current were allowed to hang within a couple of feet of the top of lumber piles upon which, it was known to defendants, boys were in the habit of playing, and it was held that, owing to the hidden and deadly effect of electric currents, it was a question for the jury to determine whether or not defendants were negligent in leaving the wires so near to the top of the lumber piles. The dangers from strong electric currents are so great and so obvious to those familiar with the effect of electricity, that more strict and stringent rules, and a broader test of liability, should be applied to the safeguarding of persons

from dangers resulting from coming in contact with such currents than should be applied to the better understood and less hazardous risks resulting from the usual conduct of ordinary business on private premises. It will thus be seen that our court has held that a person may be liable for the maintenance of a dangerous object upon or over private property where such object is deadly in its effect and the danger of coming in contact with it not obvious to every one, but it has not gone to the extent of holding a person liable to trespassers for mere ordinary passive negligence in the usual conduct of a lawful and customary business upon his own premises. The cases of *Klix v. Nieman,* 68 Wis. 271, 32 N. W. 223, and *Gorr v. Mittlestaedt,* 96 Wis. 296, 71 N. W. 656, though not squarely decisive of the question, negative the establishment of such a doctrine. The difference in the test of liability that should be applied to objects upon a public highway and to objects outside its limits was clearly stated in *Cook v. Rice Lake M. & P. Co.* 146 Wis. 535, 539, 130 N. W. 953, 132 N. W. 346, where the object complained of was on private property, as follows:

"In this class of cases it must not be forgotten that some real appreciable, efficient fault, tested by the standard of care exercised by the great mass of mankind, is necessary to liability. The mere fact that a person was injured by the act of another, is not sufficient. Further, it must not be forgotten that a person has the right to use his own property in the usual conduct of his business, characterized with the usual incidents."

That the courts in other states are in conflict on the question of the liability of owners of premises to trespassers who are injured thereon, will be seen by a reference to notes on the subject in 19 L. R. A. N. S. 1094, and in 32 L. R. A. N. S. 559, where the cases on the subject are collected. We deem the better rule to be that liability for injury to trespassers on private property should be limited to cases where the act complained of partakes of the nature of gross negligence, ob-

viously endangering the safety of others, or to active negligence committed at the time of injury. Mere failure to exercise ordinary care for the safety of trespassers is not enough. The owner of private premises owes no such duty to them. He may safely, so far as they are concerned, engage in any lawful ordinary work thereon and conduct it in a customary manner without incurring liability, even though some danger to them may reasonably be anticipated from the condition of the premises created by so conducting his work. The trial court, therefore, properly directed a verdict for the defendants.

The language in *Ryan v. Towar,* 128 Mich. 463, 470, 87 N. W. 644, is quite suggestive of the necessity of drawing a line limiting liability to trespassers within the bounds of what is reasonable and practical. The court, in commenting upon the case of *Kansas Cent. R. Co. v. Fitzsimmons,* 22 Kan. 686, said:

"Here we have the doctrine of the *Turntable Cases* carried to its natural and logical result. We have only to add that every man who leaves a wheelbarrow, or a lawnmower, or a spade upon his lawn; a rake, with its sharp teeth pointing upward, upon the ground or leaning against a fence; a bed of mortar prepared for use in his new house; a wagon in his barnyard, upon which children may climb, and from which they may fall; or who turns in his lot a kicking horse or a cow with calf,—does so at the risk of having the question of his negligence left to a sympathetic jury. How far does the rule go? Must his barn door, and the usual apertures through which the accumulations of the stable are thrown, be kept locked and fastened lest twelve-year-old boys get in and be hurt by the animals, or by climbing into the haymow and falling from beams? May a man keep a ladder, or a grindstone, or a scythe, or a plow, or a reaper, without danger of being called upon to reward trespassing children, whose parents owe and may be presumed to perform the duty of restraint? Does the new rule go still further, and make it necessary for a man to fence his gravel pit or quarry? And, if so, will an ordinary fence do, in view of the known pro-

pensity and ability of boys to climb fences? Can a man nowadays safely own a small lake or fish pond? and must he guard ravines and precipices upon his land? Such is the evolution of the law, less than thirty years after the decision of *Railroad Co. v. Stout* [17 Wall. 657], when, with due deference, we think some of the courts left the solid ground of the rule that trespassers cannot recover for injuries received, and due merely to negligence of the persons trespassed upon."

To this the court might have added that there is a growing tendency to make everybody responsible for the safety of children except their parents. This remark is made in no spirit of levity, but in the full appreciation of the obligation that rests upon every one to protect them within all reasonable bounds. The duty to safeguard them, however, rests primarily upon their parents, and such duty should not without cause be shifted upon the shoulders of strangers. Parental responsibility is in danger of becoming a vanishing quantity in this age of progress. The law should not, without effort, let it entirely disappear. These remarks can the more properly be made in this case, because the facts are such that no one can attach any blame to plaintiff's parents for the regrettable accident that befell their son. Nor can the boy himself be blamed. It is one of those, by no means rare, instances where a boy, owing to his irrepressible instinct for play, meets with disaster through the fault of no one. In such case the burden must be borne by him upon whom misfortune places it.

By the Court.—Judgment affirmed.

TIMLIN, J. (*dissenting*). In this case the mortar box was not on the premises of the defendants nor upon those of the plaintiff. The defendants were contractors, having their mortar box lawfully on the premises upon which they were engaged at work. There was a pile of sand beside the mortar box. The premises were open to the street and children of the neighborhood were, to the knowledge of defendants, ac-

customed to play around this mortar box and sand. It is quite a technical refinement to call such children trespassers. If they must be classified, they were rather licensees, namely, persons there by passive acquiescence of the owner. Knowing of this condition, the defendants went away neglecting to cover or protect the mortar box containing water-slacked lime, having a deceptive and inviting covering of about an inch of sand thereon. It was for the jury to say whether the defendants were negligent in so doing. Judicial disapproval of the so-called *Turntable Cases* should be reserved, I think, until a case of that kind occurs. This is not such a case. I do not think it is necessary to express further disapproval of the opinion.

STATE EX REL. BEITZ, Respondent, vs. BADING, Mayor, and others, Appellants.

January 17—February 24, 1914.

Municipal corporations: Taxation: Budget: Taxes to extinguish deficit and for readjustment fund: Statutes: When intended to take effect.

Ch. 606, Laws of 1913,—providing for the levy, in cities of the first class, of a tax of one-tenth of a mill for the purpose of extinguishing a deficit in the city treasury from nonpayment of taxes in previous years, and of another one-fourth of a mill for a so-called readjustment fund,—did not require such taxes to be included in the general tax levy of 1913, which had, before the passage of said act, been rightfully delimited by the adoption of a budget under then existing laws. The legislative intention was that said ch. 606 should supplement and perfect ch. 312, Laws of 1913, and that the two acts should take effect simultaneously with the creation of the budget and the levy of the taxes of 1914.

APPEAL from a judgment of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Reversed.*

P. F. Leuch and *Adolph G. Schwefel,* for the appellants.

For the respondent there was a brief by *Gilbertson, Lehr, Reitman & Kiefer,* attorneys, and *J. Elmer Lehr* and *Lehr, Kiefer & Reitman,* of counsel, and oral argument by *J. Elmer Lehr.*

WINSLOW, C. J. This is an action of *mandamus,* and the defendants appeal from the judgment awarding a peremptory writ requiring them as city officers of the city of Milwaukee to include in the tax levy for the year 1913 a tax of one tenth of a mill for the purpose of extinguishing a deficit in the city treasury, resulting from uncollected taxes in previous years, and another tax of one quarter of a mill for a so-called readjustment fund. These taxes are required to be levied by the provisions of ch. 606 of the Laws of 1913 (secs. 926—176 to 926—178, Stats. 1913), and the only question in the case is whether this last named law requires them to be included in the tax levy of 1913 or that they shall be first levied in the tax levy of 1914.

It is true that the act referred to is mandatory in its terms and contains a provision that it shall take effect upon its passage and publication, but notwithstanding these considerations we have reached the conclusion, for reasons which we will briefly state, that it was not intended to affect in any way the tax levy of 1913.

Since the year 1907 the legislative intent to place the financial system of cities of the first class purely upon the budget basis is very apparent. By ch. 494 of the session laws of that year six sections were added to the general charter law, and numbered sections 925*q*—160 to 925*q*—165. By the first of these new sections it was made the duty of the head of each department of the city government, on or before November 1st in each year, to file with the comptroller a report and estimate in writing in detail of the needs of his department for the ensuing fiscal year (*i. e.* the year commencing January 1st following). By sec. 925*q*—161 a board of es-

timate was created and required to convene November 1st each year, and to consider the estimates of the departments filed with the comptroller. This board was then required to make and submit to the council in writing on or before January 1st "a proposed budget of *taxes to be levied,*" expenditures to be made, and bonds to be issued during the coming fiscal year. By sec. 925*q*—162 the common council was required, on or before February 1st, to estimate and determine by resolution the sums of money required to meet the expenses and disbursements of the city during the current year, specifying the amount of each fund, and to include in such resolution a sufficient sum *to be levied for taxes in such year* as it shall determine to be necessary for municipal purposes, including a sum for a tax adjustment fund to be used in canceling on the treasurer's books outlawed, unpaid personal property taxes. The section also contains further provisions as to certain other special funds which may be levied, and provides for the determination at that time of the amount of bonds which shall be issued during the year, and prohibits the creation of debts or liabilities by the departments in excess of the amounts determined by the council and placed in the budget. In the official publication of the Laws of 1907 this section is headed in blackletter type, "General appropriation bill—a finality for the year." Sec. 925*q*—163 gives the council power to levy annually sufficient sums for the various specified city funds, not exceeding certain named percentages, and not exceeding in the aggregate fourteen mills on the dollar on the total valuation of the city property. Sec. 925*q*—164 required city officers to account for and pay into the city treasury monthly all fees or commissions received by them in their official capacity. Sec. 925*q*—165 provided that other cities might adopt the first two sections of the act in the same manner in which the general law is adopted.

By chs. 92 and 100 of the Laws of 1911, secs. 925*q*—162 and 925*q*—163 were amended. The amendment to the first

named section was trivial and the amendment to the last named section, while quite extensive, affected details which are unimportant so far as this case is concerned, and for these reasons it becomes unnecessary to notice them further.

It seems very certain from mere inspection of this legislation that the intent was to inaugurate a system by which, after due consideration, not only the various city funds and expenditures were to be fixed, but the amount of the tax levy for the coming year was to be finally determined as early as the 1st day of February, *i. e.* about nine months in advance of the actual levy of the tax in the following October. The wisdom of a scheme by which the amount of taxation is to be determined so long before the tax is to be levied is not a matter with which we have anything to do.

This law was in full force during December, 1912, and January, 1913, and governed the making of the estimates and budget upon which the tax levy of October, 1913, was to be based. No sum was inserted in that budget for a "tax adjustment fund," nor was any tax for that purpose included in the resolution fixing the tax levy. As this fund was, under the law then existing, a fund the levying of which was discretionary with the council, it follows that it was lawful to omit the same from that budget, and also that, such omission having been lawfully made, no levy could be made for that fund in October following, unless the same were required by the legislation of 1913.

Does ch. 606 of the Laws of 1913, which went into effect June 30th of that year, apply to the general tax levy of 1913?

To answer this question understandingly it is necessary to consider, in connection with the act in question, ch. 312 of the laws of the same year, which quite materially changes the provisions of the budget law. It was introduced in the assembly March 4, 1913, and passed by that body April 18th following, after a favorable report by the committee on municipalities. It reached the senate April 22d and was re-

ferred to the committee on corporations and passed the senate May 12th.

Chapter 606 was introduced in the assembly April 25th, was referred to the same committee as the prior bill, passed by the assembly May 29th, sent to the senate and referred to the same committee in that body as the first bill, and concurred in by the senate on June 10th. Thus it is seen that ch. 606 was introduced in the assembly while ch. 312 was still pending in the senate, that both bills went through the hands of the same committees, and that apparently they were not considered as in any way inharmonious. Ch. 312 materially changes many features of the budget law, while ch. 606 provides for the levying of certain taxes in cities of the first class. Both, therefore, seriously affect the financial system of the city of Milwaukee and must, on familiar principles, be considered as *in pari materia*.

It will be helpful to consider the purpose and effect of ch. 312 in our study of the meaning of ch. 606.

The general purpose of ch. 312 was unquestionably to further perfect the budget system and correct faults which experience had shown to exist. Evidently it had been concluded that there ought to be a larger board of estimate, a greater opportunity for the public to be heard as to the contents of the budget, and some provision for increasing any particular fund in case of emergency during the year, and allowing greater expenditure in that case than the expenditure provided for by the original budget.

To accomplish these ends the time of the filing of the estimates made by heads of departments was advanced by ch. 606 to the 1st of October, the board of estimate was increased in number by adding the finance committee of the council, the meetings of the board were thrown open to the public, and a public hearing required not only before the board but afterwards before the council, the budget was required to include a contingent fund for any emergency arising during

the year calling for the expenditure of money not expressly provided for in the budget, and sec. 925*q*—162 was entirely rewritten, the most marked change being the insertion of provisions giving the board of estimate power during the year to increase the budget estimate for any department and giving the council power to appropriate from the contingent fund the necessary sums to meet such increase.

These are the more important additions to the budget scheme included in the law of 1913, but there was also a significant omission, namely, the omission of any provision for the fund called the adjustment fund for the purpose of meeting the amount of the unpaid and outlawed personal property taxes each year.

Now it is very certain that this law was not intended to affect in any way the budget which had been made up in January, 1913, nor the tax levy based thereon to be made in October, 1913. Both that budget and that tax had been definitely determined and were not to be disturbed. It is just as certain also that there was no intention by this law to materially change or weaken the principle of the former budget law, namely, that the expenditures of the municipality are to be definitely determined in advance, and the tax levy thereafter made is to be limited to the raising of the funds so determined, except in case of some fund which is required to be raised by some other mandatory legal provision. Turning now to ch. 606 and remembering that it was introduced while ch. 312 was still pending in the senate, we are unable to discover from it any intent to affect the taxation of 1913. Nothing in its language indicates an intention to interfere with anything which had been theretofore settled or disturb the harmonious working of the budget system. It must be presumed that the legislature knew that the amount of the expenditures and prospective tax levies for 1913 had already been fixed and determined, and that any act which proposed to add to or subtract from the tax levy for the current year

would interfere with the purpose of the budget law and materially change a tax levy which had previously been rightfully delimited.

If it were proposed to make changes of this nature it would seem that the law would so provide in no uncertain terms. But the law in question does not do this.

The first section of the act provides that whenever in a city of the first class there shall exist a deficit by reason of nonpayment of taxes, the common council shall annually, until the deficit is extinguished, levy a tax of one tenth of a mill for the purpose of extinguishing such deficit. The second section provides that in all cities of the first class the common council shall annually levy a tax sufficient to cover the taxes entered on the tax roll for the year which it is estimated will remain unpaid. The third section provides that in all such cities where expenditures are made or indebtedness incurred in advance of the collection of taxes, the council shall annually (until such time as all taxes can be levied in advance) levy a tax of one fourth of a mill, the proceeds of which shall be used as a taxation readjustment fund to be used to defray the charges allowed in the *budget* of that year for some other fund in lieu of levying a tax for such other fund, and that the council shall levy a tax to defray the estimated charges for the succeeding fiscal year against such other fund, and thereafter the taxes for such other fund shall be levied in advance of the expenditures therefor.

It is very plain that the three sections of this act constitute parts of one harmonious plan; namely, a plan to put the finances of the city gradually upon a cash basis. The idea is that each fund shall, at the beginning of the fiscal year, be possessed of the actual cash required for the estimated expenditures of the year, and that there shall be an annual fund for the profit and loss account. There is no indication of any idea that part of this scheme should go into effect at one time and part at another. It rather appears to us that the

intention was that it should supplement and perfect ch. 312, and that the two acts should take effect simultaneously with the creation of the budget and the levy of the taxes of 1914.

We discover nothing in the act which forbids this construction of the legislative intention, and as this construction tends to promote the orderly conduct of municipal affairs and makes no sudden and unexpected change in matters already determined in accordance with previously existing provisions of law, we deem it the better construction.

By the Court.—Judgment reversed, and action remanded with directions to enter judgment overruling the demurrer to the return and quashing the alternative writ.

HANSON, Respondent, vs. TOWN OF CLINTON, Appellant.

February 3—February 24, 1914.

Highways: Estoppel of town to deny existence: Temporary discontinuance: Notice: Barriers: Duty of town: Injury to traveler: Contributory negligence.

1. Where, after an order was made laying out a highway, it was worked and traveled so that there was a beaten track over it, and public money was expended upon it, the town is estopped to deny that it was a public highway, even though there had been no award of damages and no order opening the road.
2. In such case, if any part of the road became defective so that it was necessary that travel thereon be discontinued while such defective condition existed, it was the duty of the town to give such notice or warning or erect such barriers as would prevent its use by travelers by night as well as by day, and in the absence of such notice travelers had the right to presume that it had not been discontinued or obstructed.
3. In an action to recover for personal injuries caused by a defective highway, evidence showing, among other things, that plaintiff's driver was driving slowly, that it was dark, and that he could not see the defect which caused the accident, is *held* to sustain a finding that plaintiff was not guilty of contributory negligence.

APPEAL from a judgment of the circuit court for Barron county: FRANK A. ROSS, Circuit Judge. *Affirmed.*

This action was brought to recover for personal injuries alleged to have been caused by a defective highway. The defendant denied liability. The jury returned the following verdict:

"(1) Was the plaintiff injured in her person by being tipped from a vehicle being driven by her husband over the alleged highway in question on the 24th day of July, 1910? *A.* Yes (by the court).

"(2) Was the highway in question at the time and place of accident insufficient or in want of repair, having regard for the amount and kind of travel to which the same was subjected? *A.* Yes (by the court).

"(3) Had the barrier which was placed across the alleged highway by the witness Lilly about June 18, 1910, been down prior to the date of the accident for such length of time as that in the exercise of ordinary care the officers of the town should have known it was down and replaced the same? *A.* Yes.

"(4) Was the condition and appearance of the highway west of the place of the accident in question such that, in the exercise of ordinary care, the driver of the vehicle in which plaintiff was riding when injured ought to have known that such highway was not then open for travel? *A.* No.

"(5) Were the plaintiff or her husband guilty of any want of ordinary care in the premises which proximately contributed to produce plaintiff's injuries? *A.* No.

"(6) What amount of money will reasonably compensate plaintiff for her injuries? *A.* $300."

In addition to the findings of the jury the court made the following: That the place where plaintiff sustained her injuries was a public highway within the defendant town; that the insufficiency and want of repair of said highway at the place in question were the proximate cause of plaintiff's injuries; that within thirty days after the happening of said injury plaintiff caused to be served upon one of the supervisors of said defendant town a sufficient notice in writing

stating the time and place where such damage occurred and describing generally the insufficiency and want of repair which occasioned said injuries, the injuries received by plaintiff, and that satisfaction was claimed by her of said town; that more than ten days elapsed after the town meeting alleged in the complaint before the commencement of this action.

For the appellant there was a brief by *C. C. & A. E. Coe,* and oral argument by *A. E. Coe.*

Chas. A. Taylor, for the respondent.

KERWIN, J. The assignments of error are discussed under two heads, namely, (1) that the place of injury was not a public highway; and (2) that the place of injury was so defective that plaintiff was guilty of contributory negligence in traveling upon it in the dark. It appears from the evidence that plaintiff, her husband, and two others, on the morning of July 24, 1910, started on a trip with a two-seated open buggy, drawn by a farm team, to visit relatives who resided twenty-five miles distant. On their way home and after they had gone about one third of the distance they turned east onto a different road from the one traveled in the morning. For a mile or more the road was fairly good, but after they had passed the residence of one Lilly, where the road was running east on the section line and went down a hill and across a bridge, the road became rough, crooked, and grew worse. It was then about 9 o'clock in the evening. The party followed a road or trail southerly into an open field, and seeing that they were off the road they turned around, went back to where they had left the trail running easterly, and continued east. For some distance before they turned into the field the track had departed from the straight east-and-west course, apparently to swing southerly around a swamp, and when they got back to the track after turning around and started east the track wound around stumps for

twenty-eight or thirty rods before it got to the section line again. The section line where the road belonged was rough and not fit to be traveled. After the party got back to the line it was dark. They crossed a tamarack swamp and turned up a rough hill, at the top of which the accident occurred. The team was going slowly, but the buggy tipped over. The plaintiff was unfamiliar with the road. It had the appearance of having been worked and money expended upon it.

The piece of road upon which the accident occurred had been laid out in September, 1904, six years before the accident, and had been worked some by the town at different times for five years. A short time before the accident the town had been blasting stumps and plowing along the section line for some fifty rods, not in the traveled track, but on the section line, beginning directly north of the southern point of deviation of the traveled track from the section line and about three rods north of such point and continuing from there fifty rods east to the section line. The road ran through a new country, but had been worked and improved where necessary by bridges, culverts, filling, and grading, and while it deviated from the section line its greatest deviation was about three rods.

The chief contention of counsel for appellant is that the place in question was not a public highway, therefore the defendant is not liable. An order was made by the board of supervisors of the defendant town in 1892 laying out a highway between sections 21 and 28, but no award of damages and no order opening the road were made. Some work was done upon this highway in 1909. The highway in question runs east and west on the section line between sections 19 and 30, 20 and 29, 21 and 28, in the town of *Clinton,* Barron county. The injury occurred about two miles east of the west line of the town of *Clinton* and near the corner of sections 20, 21, 28, and 29 in the town of *Clinton.* The evidence shows that an order was made laying out a highway be-

tween sections 21 and 28 in August, 1892, but it does not appear that any award of damages was made nor any order opening the road. This part of the road was not in condition for travel, although some work had been done upon it in 1909 and some before.

As to the part of the road between sections 20 and 29 the evidence shows that an order laying out this road was made in September, 1904. No award of damages and no order opening this road were made. The accident occurred within the limits of this last described road.

It is contended by appellant that, the order laying out the highway not having been followed by an award of damages and an order to remove fences, and the road not having been worked or traveled sufficiently, there was no public highway. There is an abundance of evidence, however, that after the making of the order laying out the highway in question it was worked and traveled and public money expended upon it; that there was a beaten track over it indicating considerable travel; and that a barrier placed across the road about June 18, 1910, had been down for a considerable length of time before the accident in question. Many witnesses were produced who testified that they had traveled over the road and that there was a traveled track over it. The road in question having been traveled sufficiently to indicate that there was a highway, it was the duty of the defendant, in case any part of it became defective, dangerous, and unfit to be traveled, in consequence of which it was necessary that travel thereon be discontinued while such defective condition existed, to give such notice or warning or erect such barriers as would prevent its use by travelers by night as well as by day, and in the absence of such notice travelers had the right to presume that such highway had not been discontinued or obstructed. *Bills v. Kaukauna,* 94 Wis. 310, 68 N. W. 992.

A careful examination of the record convinces us that as between the defendant and the traveling public the evidence

is sufficient to estop the defendant from denying the existence of a public highway at the point of the accident. *Codner v. Bradford,* 3 Pin. 259; *Houfe v. Fulton,* 34 Wis. 608; *Cronin v. Delavan,* 50 Wis. 375, 7 N. W. 249.

It is further contended by counsel for appellant that the plaintiff was guilty of contributory negligence, hence no recovery could be had. The evidence shows that plaintiff was driving slowly, that it was dark, and that the driver could not see the defect which tipped the rig over. The evidence is ample to support the finding of the jury that the plaintiff was not guilty of contributory negligence. *Bills v. Kaukauna,* 94 Wis. 310, 68 N. W. 992; *Sedlack v. State,* 141 Wis. 589, 124 N. W. 510; *Estey O. Co. v. Lehman,* 132 Wis. 144, 111 N. W. 1097; *Smith v. Peterson,* 145 Wis. 284, 129 N. W. 1062. The findings are supported by the evidence and no prejudicial error appears in the record.

By the Court.—The judgment is affirmed.

BROOKS and another, by guardian *ad litem,* Appellants, vs. DIKE and wife, Respondents.
IN RE BROOKS.

February 3—February 24, 1914.

Tax titles: Fraudulent conveyance by original owner: Rights of infant grantees: Quieting title: Invalid tax deed: Judgment.

1. A voluntary conveyance to infant grantees of land which is subject to the lien of an outstanding tax certificate, while ineffectual to confer upon such infants any right or title which would hinder or delay the certificate holder in respect to foreclosure and sale, is nevertheless good between the parties and entitles the grantees to assert all those rights in and to the land which, had the conveyance not been made, the grantor himself could assert against a tax title based upon such certificate. *Corry v. Shea,* 144 Wis. 135, distinguished.

2. The tax-title holder cannot in such a case urge the fraudulent character of a deed to the infant grantees to prevent them from attacking his tax title upon grounds which would have been available to their grantor, or from redeeming within the time redemption could have been made had the deed to the infants never been executed.
3. Even if such infant grantees, by reason of taking with knowledge that the purpose of the deed was to hinder and delay the holder of the tax certificate, were to be regarded as in equal delict with their grantor, they would not be thereby barred from maintaining an action to quiet title as against the grantee in a tax deed who took the same without giving notice of his application therefor in a case where such notice was required.
4. In an action to quiet title, brought against a tax-title claimant, under sec. 3186, Stats., if the tax deed be adjudged void the plaintiff will be entitled to judgment upon making the payments mentioned in sec. 1210k.

APPEALS from a judgment and an order of the circuit court for Douglas county: FRANK A. ROSS, Circuit Judge. *Reversed.*

In the action above entitled the infant appellants, claiming to be the owners in fee of the northeast quarter of the northwest quarter of section 22, township 48 north, range 14 west, except the right of way of the Eastern Railway Company of Minnesota thereon, and that such claimed premises are vacant and unoccupied except the right of way of the *Minneapolis, St. Paul & Sault Ste. Marie Railway Company* thereon, averred that the defendants, *Henry B. Dike* and *Mary E. Dike,* make some claim to all of said northeast quarter of the northwest quarter except these two right-of-way tracts, and demand judgment that the plaintiffs' claim be established against any claim of the defendants and that the defendants be forever barred against having or claiming any right or title to the land adversely to the plaintiffs.

In the special proceeding above entitled the same infants averred their ownership at all times since July 29, 1903, of the same land except the right of way of the Eastern Railway

Company of Minnesota, and that during the years 1908 and 1909 the *Minneapolis, St. Paul & Sault Ste. Marie Railway Company* located, graded, and constructed its roadbed on their land and has since maintained and operated its railroad upon that part of the forty-acre tract above described. That the said railway company did so without having acquired title to the land and without having instituted any proceedings for condemnation or other acquisition of said land or any part thereof. The infants prayed for an order fixing a time and place for a hearing and for the appointment of commissioners to appraise and determine the value of the land so taken by said railway and the damages sustained by petitioners.

In the action, after trial and hearing, the court made findings of fact beginning with the recital that the action was commenced on or about July 7, 1910, and the special proceeding on the same day, and that many if not all the questions of law and fact involved are common to both, and that the property alleged to have been taken by the railway company was so taken and the title held under a conveyance from the defendants, *Henry B. Dike* and *Mary E. Dike,* his wife, to said railway company. The claim of title of said *Henry B. Dike* and wife to said land so conveyed was the same title claimed by them to the forty-acre tract in question. The parties having stipulated in open court to try said action and special proceeding together, the court made findings of fact which resulted in judgment for the defendants in the action and in an order dismissing the special proceeding.

It appears without substantial controversy that on and prior to July 29, 1903, J. Cora Smith was the lawful owner of the land in question. Findings are to the effect that on July 29, 1903, there was executed and delivered by J. Cora Smith to the infant plaintiffs, then aged twelve and fourteen years respectively, a deed including the land in controversy. At that time and for a long time prior thereunto the lands

described in said deed were heavily incumbered with delinquent and unpaid taxes, and the forty-acre tract first herein described was sold in May, 1902, for the taxes of 1901, and in May, 1903, for the taxes of 1902, and the county of Douglas held the tax certificates for said two years, but thereafter sold and assigned them for value to the defendant *Henry B. Dike,* who obtained tax deeds thereon which were executed in due form and recorded in the office of the register of deeds of the proper county on July 17, 1907. Under these tax deeds the defendants and the railway company claimed title, the railway company claiming under *Henry B. Dike* and wife by deed dated September 15, 1909, recorded September 17, 1909. J. Cora Smith made said deed to the infant plaintiffs voluntarily, without consideration, and with intent to hinder, delay, and defraud the holder of the tax certificates above mentioned of his lawful actions and rights to foreclose said certificates, and for the purpose of extending the time for redemption of said lands from the delinquent taxes represented by such certificates. It was further found that the alterations, changes, and erasures indicated by this deed were satisfactorily explained so as to admit the deed in evidence. The amount of taxes represented by the certificates purchased by *Henry B. Dike,* with interest thereon, and the amount of subsequent taxes paid or redeemed by him, with interest thereon, were found, and that the tax deeds to *Henry B. Dike* were issued on an affidavit of nonoccupancy made on July 11, 1907, also that on that date and for more than two years immediately preceding a large portion of the land covered by the tax certificates and tax deeds, comprising more than half its area, was continuously surrounded by a substantial wire fence and in the occupancy and possession of one Mrs. Carey by permission of the agent of the fee owner. Also that the Great Northern Railway Company was then and for several years had been in actual occupancy and possession of a right of way extending diagonally north and south across said forty-

acre tract, and containing about eight acres, and that no notice of the application for such tax deeds was given to or served upon any person, but such deeds were issued upon an affidavit of nonoccupancy dated July 11, 1907.

As conclusions of law the court found that the deed from J. Cora Smith to the infant plaintiffs of July 29, 1903, was made for the purpose of hindering and delaying the holder of the tax certificates mentioned of his lawful actions and that said deed was and is illegal and void, also that the tax deed held by the defendant *Henry B. Dike* was illegal and void, but notwithstanding this that the plaintiffs are not entitled to maintain the above action against *Henry B. Dike* and wife nor the condemnation proceedings against the railway company; and the judgment in the action and the order in the special proceeding are final and apparently vest title in the defendants as against plaintiffs.

For the appellants there was a brief by *Grace, Hudnall & Fridley,* and oral argument by *George B. Hudnall.* They contended, *inter alia,* that the deed to the infant plaintiffs, if made to hinder, delay, and defraud the holder of the tax certificate, was within the purview of sec. 2320, Stats. *Corry v. Shea,* 144 Wis. 135, 128 N. W. 892. Hence it was merely voidable as to the person injured, but good as between the parties and effectual to pass the legal title. *Clemens v. Clemens,* 28 Wis. 637; *Davy v. Kelley,* 66 Wis. 452, 29 N. W. 232; *Gross v. Gross,* 94 Wis. 14, 68 N. W. 469; *French L. Co. v. Theriault,* 107 Wis. 627, 83 N. W. 927; *Hyman v. Landry,* 135 Wis. 598, 116 N. W. 236; *Mueller v. Bruss,* 112 Wis. 406, 88 N. W. 229. The rights of the defendants were no greater than if the conveyance had been made to adults. *Ableman v. Roth,* 12 Wis. 81; *Castleman v. Griffin,* 13 Wis. 535; *Barber v. Kilbourn,* 16 Wis. 485; *Potter v. Necedah L. Co.* 105 Wis. 25, 80 N. W. 88, 81 N. W. 118.

For the respondents there was a brief by *Luse, Powell & Luse,* and oral argument by *L. K. Luse.*

TIMLIN, J. All the findings of fact of the learned circuit court seem to be supported by evidence. This includes the finding that alleged alterations appearing upon the deed of July 29, 1903, to the infant plaintiffs were sufficiently accounted for and explained so as to admit that deed in evidence. But the conclusions of law based on such findings are incorrect. The learned circuit court seems to have given the rule of the case of *Corry v. Shea,* 144 Wis. 135, 128 N. W. 892, an unwarranted extension. In that case the owner and holder of tax certificates, one at least of which was ripe for foreclosure, brought an action to set aside as invalid under sec. 2320, Stats., a voluntary conveyance, made at or about the time the right of foreclosure accrued, by the landowner to his infant son, for the purpose of extending the time for redemption, and thus hindering, delaying, or defeating the plaintiff's action of foreclosure. Under former decisions of this court construing statutes then and now in force, a conveyance to an infant of real estate upon which there were outstanding tax certificates of sale had the effect, if permitted to stand, to extend the time of redemption until that infant arrived at the age of twenty-one years and within one year thereafter. This, we considered, had become a rule of property and we did not feel at liberty to change it. Therefore, if the deed to the infant were held valid it conferred upon the infant greater rights than those possessed by his adult grantor and operated to hinder and delay a foreclosure suit upon the tax certificate, because the foreclosure decree therein would be subject to a right of redemption different from and greater than that possessed by the adult grantor of the infant. But the learned circuit court in the instant case held the defendants entitled to greater rights than creditors or "others" can assert under sec. 2320, *supra,* and limited the plaintiffs in the assertion of rights which may be asserted by grantees whose grant is within the purview of said section. As in *Corry v. Shea, supra,* so under the findings in this case would

the deed under which the infants claim have been invalid to confer upon such infants any right or title which would stand in the way of the tax-title holder asserting any right which he could have asserted against the grantor of such infants. But where the voluntary conveyance to the infants did not and could not hinder, delay, or defraud, viz. as to all those rights and interests unaffected by the voluntary conveyance and which could have been as effectively and as easily asserted without the conveyance to the infants, or had that conveyance never been made, a different rule applies. For example, a mortgagee cannot complain of a subsequent conveyance of the equity of redemption as fraudulent, because his rights are in no manner injuriously affected. The conveyance is not void as to such rights. *Hodson v. Treat,* 7 Wis. 263.

"A creditor cannot impeach a conveyance without showing that he has been injured thereby, and, to entitle him to equitable relief, it is necessary for him to show that he has been thereby deprived of his remedy at law, and is therefore compelled to resort to equity." 20 Cyc. 419, cites cases from twenty-six states of this Union in support of the foregoing. In *A. D. Baker Co. v. Booher,* 153 Wis. 319, 141 N. W. 248, it was held that assuming the husband and wife joined in the conveyance to their sons, fraudulent as to creditors, taking back an agreement for support, and the wife in a subsequent divorce suit obtained a decree transferring to her as a final division of his property all the husband's interest in and to the land so conveyed to the sons, creditors of the husband suing afterward could not have the transfer set aside. Furthermore, a conveyance by husband to wife of the homestead cannot be considered fraudulent as to his creditors, because, being exempt from execution, it is no more beyond their reach after the conveyance than it was before. *Pike v. Miles,* 23 Wis. 164; *Shawano Co. Bank v. Koeppen,* 78 Wis. 533, 47

N. W. 723; *Bank of Commerce v. Fowler,* 93 Wis. 241, 67 N. W. 423; *Bartle v. Bartle,* 132 Wis. 392, 112 N. W. 471.

"According to natural and authoritative exposition, the statute was not intended to enlarge the rights of creditors further than might be necessary to enable them effectually to defeat the alienation made by the debtor; aside from this, creditors have no greater rights (under the statute of Elizabeth) against the alienee than they would have had against the debtor had there been no alienation." Bigelow, Fraud. Conv. (Revised ed. 1911) 52, 53.

Because a deed is invalid under sec. 2320 as against certain rights of the creditor or "other person," it is not necessarily invalid against every right which that creditor or other person may assert and which were not injuriously affected by the fraudulent conveyance.

Upon the findings these defendants never had title or right of action to assert title, which they could enforce against the grantor of the infant plaintiffs. Prior to his election to take a tax deed on the land, *Mr. Dike* had a lien by virtue of the certificates of tax sale. As against this lien the conveyance to the infants was invalid and ineffectual to hinder or delay foreclosure and sale. He still has that lien. But the voluntary and fraudulent conveyance to the infants did not give to *Mr. Dike* other or greater rights than he had against the grantor of the infants. He thereby acquired no right to take a tax deed without notice nor to refuse redemption within the time fixed for redemption by adult persons. On the other hand, the conveyance to the infants was good as between the parties to it and transferred to the infants all those rights in and to the land which the grantors themselves could assert against the tax-title holder had the conveyance not been made. *Home Inv. Co. v. Emerson,* 153 Wis. 1, 140 N. W. 283. For these reasons the tax-title holder cannot urge the fraudulent character of the deed to the infant plaintiffs to prevent them

from attacking his tax title upon grounds available to their grantor had the fraudulent conveyance never been made; nor deny them the right of redemption within the time redemption could have been made had the deed to the infants never been executed. Sec. 1165, Stats.

If we assume as most favorable to the respondents that these infants, at the time aged respectively twelve and fourteen years, by mere receipt of the title from their grantor, or by such receipt with knowledge of the purpose of the conveyance to them, were in equal delict with their grantor, they would not be thereby barred from maintaining this action. Their conduct, if it merited this condemnation, nevertheless did not affect the equitable relations between them and the defendants asserted in this action, or place the defendants in any worse position with reference to the rights here asserted than the latter would have been had no such conveyance been accepted. Their misconduct, if misconduct it was, is unconnected with the matter in litigation and did not concern or affect the title of the opposite party asserted in this action. 1 Pom. Eq. Jur. (3d ed.) § 397 *et seq.*

We consider the action one under sec. 3186, Stats., hence governed by sec. 1210*h*. The plaintiffs will be entitled to judgment upon the findings upon condition of their making the payments mentioned in the latter section. They are also entitled to have commissioners appointed in the special proceeding.

By the Court.—Judgment reversed, and cause remanded with directions to enter judgment for plaintiffs in the action as above directed; and the order refusing to appoint commissioners and dismissing the special proceeding is reversed and remanded for further action in conformity with law. The appellants to recover one bill of costs in this court.

DIXON, Appellant, vs. RUSSELL and another, Respondents.

February 3—February 24, 1914.

Jurors: Examination: Interest in casualty insurance company: Master and servant: Injury from unguarded gearing: Contributory negligence: Evidence: Admissions: Res gestæ: *Trial: Rebuttal: Special verdict: Unnecessary question: Instructions to jury: Positive and negative testimony: Appeal: Harmless errors.*

1. In an action for a personal injury to an employee it was not error to refuse to permit jurors to be examined as to their business relations or connections, if any, with certain insurance companies which were not claimed to be interested directly or indirectly in the controversy.
2. The exclusion of evidence tending to show that gearings in which plaintiff was hurt were so located as to be dangerous to employees in the performance of their duties, is not error of which the plaintiff can complain where the jury found in his favor upon that issue.
3. In an action for a personal injury, statements made by the plaintiff immediately after the accident, or while leaving the scene of the accident and within 100 feet thereof, to the effect that it was his own fault, are admissible as part of the *res gestæ* and hence not within the purview of sec. 4079*m*, Stats. 1911.
4. Where a witness, though present at the time of an accident, did not testify in chief as to how it happened, and the record fails to show that he knew or claimed to know how it occurred, there was no error in refusing to permit him to be cross-examined on that subject.
5. How wide a range evidence in rebuttal shall take is very much a matter of discretion with the trial court, and unless there is a clear abuse of discretion in excluding testimony such exclusion cannot be held error.
6. While the exclusion of evidence offered in rebuttal merely because it should have been offered in chief might constitute error if it related to a material issue upon which the evidence was close and conflicting, it is otherwise where the offered evidence is not very material.
7. Where an injured employee had two obviously safe ways of performing a duty, and voluntarily chose an obviously dangerous way instead, a finding that he was guilty of contributory negligence was justified.

8. In an action for a personal injury, evidence that defendants had promised the plaintiff to cover the gearing by which he was injured was properly excluded, since the defense of assumption of risk has been abolished by statute (sec. 1636*jj*, Stats. 1913) and the evidence was not material upon the issue of contributory negligence.
9. The submission to the jury of a question as to whether plaintiff was instructed, prior to his injury, not to do his work in the manner in which he was doing it when injured, was not prejudicial error, although such question related to a mere evidentiary fact, where that point was sharply litigated on the trial and all the ultimate issuable facts were covered by the other questions of the special verdict.
10. An instruction that evidence as to admissions of a party made in casual conversations and to disinterested persons is regarded as the weakest kind of evidence, was properly refused when requested as applicable to statements forming part of the *res gestæ*.
11. Where two witnesses testified to certain statements made by the plaintiff, and other witnesses testified that they were present and heard nothing to that effect, it was proper to give an instruction as to the relative weight of positive and negative testimony.
12. It is not error to refuse to give a requested instruction which is substantially given in the general charge.

APPEAL from a judgment of the circuit court for Douglas county: FRANK A. ROSS, Circuit Judge. *Affirmed.*

Action for a personal injury. On August 13, 1912, defendants were engaged in the work of paving and repairing streets in the city of Superior, and plaintiff, a stationary engineer, was employed by them to operate a machine for making concrete. The machine was mounted upon four wheels and a framework extending from front to back. The right-hand side of the machine, facing toward the front, was the engineer's side. The material was mixed in a revolving drum, which was about four feet three inches long. Around its center was a band gear or cog-wheel. Above the center of the drum there was a revolving shaft, seven and one-half feet from the ground, carrying a ten-inch gear wheel which meshed

with the gearing on the drum. The distance from the frame, or rail of the frame, up to the gearing where it meshed with the cogs on the band of the drum was about five feet. On top of the machine, toward the front end thereof, was a tank from which water was discharged into the drum, in such quantities as was needed, by means of a chain which hung down on the engineer's side, outside of the drum and over the shaft, where he could reach it from the ground. This chain hung ten inches toward the forward end of the machine from the gearing in question. On the other side of the machine, at the immediate rear end, there was a framework suitable to be used as a ladder for reaching the top of the machine. The width of the machine from one side of the frame to the other was about four feet six inches, and the diameter of the drum was about four feet. The rear wheel on which the machine was mounted was three feet high and its top was twenty-two inches back from where the chain hung down. This chain broke near the gearing, and the plaintiff, without stopping the machine, got up on top of the rear wheel, on the engineer's side, for the purpose of mending it. In doing so he in some way got his left hand drawn into the gearings, whose contactual surfaces revolved away from him, and received the injuries complained of.

By special verdict the jury found (1) that the gearing in question was so located as to be dangerous to employees in the discharge of their duties; (2) that the absence of any guard over the gearing was the proximate cause of the injury; (3) that the plaintiff was guilty of a want of ordinary care that contributed proximately to produce his injury; (4) that the plaintiff prior to the injury was instructed not to go upon the machine on the side where the gearing was located, when the machine was running; and (5) damages $1,000. From a judgment entered upon such verdict in favor of defendants the plaintiff appealed.

W. P. Crawford, for the appellant.

For the respondents there was a brief by *Luse, Powell & Luse,* and oral argument by *L. K. Luse.*

VINJE, J. The first error assigned is the refusal of the court to permit several of the jurors to be examined as to their business relations or connections, if any, with the Royal Insurance Company or with the Casualty Company of America. Questions well calculated to disclose the business relations, if any, of the jurors with these two companies or their local agents were put to them in various forms by counsel for plaintiff, and the objections thereto were in each case sustained by the court. The array was challenged. Counsel did not claim upon the trial, nor is there now any claim or suggestion, that either of the insurance companies was directly or indirectly connected with or interested in the controversy. Such being the case, the rulings were correct. Time should not be wasted, nor prejudice injected into a case, by an examination of jurors to determine their qualifications on a subject that is not even claimed to be relevant and which cannot be seen or presumed by the court to be so. In *Faber v. C. Reiss C. Co.* 124 Wis. 554, 102 N. W. 1049; *Chybowski v. Bucyrus Co.* 127 Wis. 332, 106 N. W. 833; and *Howard v. Beldenville L. Co.* 129 Wis. 98, 108 N. W. 48, claims or suggestions were made to the court that insurance companies were interested in the result of the litigation, and it was held that jurors might be interrogated as to their connection with them in order to determine or aid in determining their qualifications to sit upon the jury. The record here fails to show any connection or even claim of a connection between the insurance companies named and the suit being tried.

A number of exceptions are taken to the exclusion of evidence relating to the issue as to whether or not the gearings were so located as to be dangerous to employees in the discharge of their duties. There were two grease cups located

on the horizontal shaft, each twenty-two inches from the gearing. The court refused to permit the plaintiff to testify as to whether or not he had to get up over the tank close to the uncovered gearing in order to fill the grease cups while the machine was in operation. The court also refused to permit the plaintiff to testify as to whether or not before the accident he was instructed to fill the grease cups while the machine was running, and evidence on the part of the plaintiff to the effect that he would have to get up on the machine to screw down the grease cups so that they would feed was excluded. All this excluded evidence was material upon the issue as to whether the gearing was so located as to be dangerous to employees. But inasmuch as the jury found for the plaintiff on this issue the error becomes immaterial.

Defendant's foreman, Carroll, was standing near the machine at the time of the injury, and he was permitted to testify that immediately after plaintiff was hurt the witness turned around and was then about five feet from plaintiff, and asked him how did it happen, to which plaintiff replied, "It was my own fault, my fingers got ketched in the gearing." Plaintiff then proceeded immediately across the street to the office of the Superior Water, Light & Power Company, and as he was going towards the office and while within 100 feet of the place of the accident he said to the witness Ross that it was his own fault—nobody's fault but his own. The witness Ross did not claim to have seen the accident and testified in chief only as to what the plaintiff said to him as he was going towards the office of the Superior Water, Light & Power Company. It is urged that the testimony of the foreman, Carroll, was improperly received because sec. 4079*m*, Stats. 1911, provides:

"In civil actions for damages caused by personal injury no statement made or writing signed by the injured party within seventy-two hours of the time the injury happened or accident occurred, shall be used in evidence against the party

making or signing the same unless such evidence would be admissible as part of the *res gestæ.*"

That the statements made by the plaintiff to the witnesses Carroll and Ross immediately after the injury were admissible as part of the *res gestæ* is clearly established by the decisions of this court. *Rideout v. Winnebago T. Co.* 123 Wis. 297, 101 N. W. 672; *Zoesch v. Flambeau P. Co.* 134 Wis. 270, 114 N. W. 485; *Cohodes v. Menominee & M. L. & T. Co.* 149 Wis. 308, 135 N. W. 879. The court also properly excluded any cross-examination of the witness Ross as to how the injury happened, because the witness did not testify in chief as to how it happened, nor, so far as the record shows, did he know or claim to know how it occurred.

In proving his case in chief the plaintiff introduced testimony as to what his duties were, as to what were the positions of the different employees about the machine at the time he was injured, and as to orders and directions alleged to have been given to him by the defendants as to the management of the machine. Among other things he testified that one Detlinger was present and at times gave orders how the work should be done; that in his presence *Mr. Russell* told plaintiff not to shut the machine down a minute; that he must keep it running; and that he instructed plaintiff to go up and fix the chain at the time of the accident. He also testified that before the accident he was told by Mr. Detlinger to do the work of fixing the trap or the tank while the machine was running. *Mr. Russell* denied that he gave any such directions to plaintiff as were testified to by him, and so did Mr. Detlinger, and the latter testified that he told the plaintiff that if he wanted to go up on the machine he should go on the far side, or shut it down; that he told him more than once that it was dangerous. Upon rebuttal plaintiff offered several witnesses to testify to the fact that no such orders or directions were given the plaintiff as were testified to by *Mr. Russell* and Mr. Detlinger. The court excluded such testimony on the ground

that it was the duty of the plaintiff to put in all his evidence on the subject in chief, and that the offered testimony was not strictly rebuttal to any new matter brought out by the defense. How wide a range evidence in rebuttal shall take is very much a matter of discretion on the part of the trial court, and unless there is a clear abuse of such discretion in excluding testimony the exclusion cannot be held reversible error. *Stanhilber v. Graves,* 97 Wis. 515, 73 N. W. 48. We should have been better satisfied had the trial court admitted this offered testimony; and had it related to an issue upon which the evidence was close and conflicting it might have had to be held prejudicial error to exclude it. But the testimony as to the construction and operation of the machine, and as to just what the plaintiff did and how he stood at the time he was injured, is practically undisputed, and upon plaintiff's own statement the jury were justified in finding him guilty of contributory negligence. The evidence shows that at the time plaintiff was injured he was standing upon the rim of a wheel three feet in diameter, the rim of which had projections on it to enable it to engage the surface over which it traveled; that he reached over about twenty-two inches to one side and about two feet forward to catch hold of the end of the chain which hung only ten inches from an open gearing whose contactual surfaces so revolved as to draw his hand into it if it became caught therein. When plaintiff stood on the wheel the intermeshing surfaces of the gearing were about on a level with his chin. As before stated, he was required, in order to catch hold of the chain, to reach sideways and forward and to put his hand very close to the gearing. His own testimony as to how he got hurt is as follows:

"The way I come to get my hand in that gearing, I was fixing the chain which was broke. When I fixed the chain, I did not draw the chain over the gearing; I drew it over towards me when I stood on the wheel; I drawed it to the side of the gearing. I stood on this wheel which is in the rear

of the gearing. When I drew it to me I drew it as I drew it across here (indicating). I drawed it pretty near even with the gearing; you can draw it alongside of the gearing. I was standing on the wheel in the rear of the gearing; the chain is to one side of the gearing . . . I had the chain right alongside of the gearing. The chain as it hung down from the tank hung towards the front end of the drum, and when I stood on the wheel I was toward the rear end of the drum; when I drew it to me. I did not draw it somewheres near across that gear or this cog-wheel on the big drum; I drawed it near the side of the cog-wheel . . . I was putting a wire on it to put it together; wiring the two pieces of the chain together; the piece that was left and the piece that was broke off . . . (The chain) hung down past the shaft about four inches. I did not lose my balance . . . I was not dizzy or anything of that sort; nobody struck me . . . I had a wrist glove on; by wrist glove I mean a glove that the glove projects over the wrist; goes up over my coat; I had on a jacket. The finger part of the glove went in and my fingers were in it."

Inasmuch as plaintiff had two obvious safe ways of fixing the chain, the jury no doubt found he was guilty of contributory negligence because he voluntarily assumed an obviously dangerous way instead of either of the two safe ways. One safe way was to shut the machine down and stop the revolving gearings; the other, was to go up on the frame on the other side, where he would have been equally near to the chain, and fix it from that side. Had he done so, it would have been impossible for him to have been injured by the gearing, because the contactual surfaces thereof would have revolved towards him and so could not have drawn his hand into the gearing even if he had come in contact with it. The jury presumably found that his negligence consisted in attempting to fix the chain from the side he did in the face of obvious danger, when, either by shutting the machine down or going to the other side, he could have fixed it with perfect safety. Such being the uncontradicted testimony, the offered evidence excluded upon rebuttal does not become very material and its exclusion cannot be held to be prejudicial error.

The plaintiff offered to show that the defendants had some time previous to the injury promised to cover the gearing, but the court excluded the evidence. Such excluded evidence would have been material on the issue of assumption of risk, but there was no such issue in the case, since the statute (sec. 1636*jj*, Stats. 1913) abolishes that defense. The offered evidence was not material upon the question of plaintiff's contributory negligence.

In arguing the case to the jury plaintiff's counsel said: "You heard the questions put to these witnesses called upon the stand this morning and the objections to them," referring to questions propounded to certain witnesses in rebuttal. The court remarked: "The jury has no right to consider evidence that is excluded nor questions to which answers were excluded." The plaintiff excepted to such remarks of the court, claiming them to be prejudicial. The only redeeming feature about the exception is that it is not very seriously urged in the brief.

Among other questions submitted to the jury was the following: "Was the plaintiff, prior to the injury, instructed not to go upon the machine on the side where the gearing was located, when the machine was running?" It is claimed this was prejudicial error because the submitted question bore upon no ultimate issuable fact. That is true. The verdict would have been and was complete without it. But the fact as to whether plaintiff was so notified or instructed was sharply litigated upon the trial, and its inclusion cannot be held to be prejudicial error where all the ultimate issuable facts are covered by the other questions of the special verdict.

The plaintiff requested the court to charge the jury as follows:

"Although admissions of a party satisfactorily proven tending to disprove the claim made by him may be considered by the jury, yet evidence of casual conversations or admissions by a party, made in casual conversations and to disinterested persons, are regarded by law as very weak testi-

mony; owing to the liability of the witness to misunderstand or forget what was really said or intended by the party. All admissions made by a party to third and disinterested persons is the weakest kind of evidence that can be produced."

Substantially similar instructions were approved in *Haven v. Markstrum,* 67 Wis. 493, 30 N. W. 720, and in *Emery v. State,* 101 Wis. 627, 657, 78 N. W. 145, where they were applicable. The court refused to give the instruction, and the plaintiff excepts on the ground that it was relevant and material to the testimony given by the witnesses Carroll and Ross as to what the plaintiff is claimed to have said to them immediately after the injury occurred. The refusal was proper. The evidence given by the witnesses referred to, was not in the nature of admissions within the meaning of the instruction requested. The evidence was strictly a part of the *res gestæ*—statements or expressions made by the plaintiff at the time of his injury or so near thereto as to characterize the act. There is a clear distinction between evidence of such statements and evidence of admissions made subsequent to the injury and so remote therefrom as not to be a part of the *res gestæ. Felt v. Amidon,* 43 Wis. 467; *Hermes v. C. & N. W. R. Co.* 80 Wis. 590, 50 N. W. 584; *Garske v. Ridgeville,* 123 Wis. 503, 102 N. W. 22.

Plaintiff also complains of the instruction given with reference to proximate cause in so far as it affected the question of contributory negligence, contending that it omitted an essential element, to wit, the element of reasonable anticipation. It is to be regretted that counsel did not print the whole instruction as given by the court. If he had, he would have discovered that the element of reasonable anticipation was properly covered by the instruction given. The court said:

"You cannot find the absence of a guard over the gearing in question to have been the proximate cause of the injury here unless such injury was the probable as well as the natural consequence of the absence of such guard, and you can-

not find the absence of a guard over the gearing in question to have been the proximate cause of plaintiff's injury unless a person of ordinary intelligence and prudence ought reasonably to have foreseen that an injury to another might probably follow as a natural result of the absence of such guard."

The following instruction requested by plaintiff was refused: "As to question 3, you are instructed that the mere fact that plaintiff knew, understood, and appreciated the danger of injury from the exposed gearing will not justify you in finding him guilty of contributory negligence." The court in its charge under this question said: "You are instructed that the mere fact that the plaintiff knew, understood, and appreciated the dangers of the exposed gearing will not justify you in finding him guilty of contributory negligence, but it must appear that, knowing, understanding, and appreciating the dangers of the exposed gearing, he did not exercise ordinary care to avoid injury therefrom." It will thus be seen that the requested instruction was substantially given in the charge.

Under question 3 the court instructed the jury as follows:

"There is evidence in the case as to certain statements made by the plaintiff immediately after the accident as to its being his own fault. You are instructed that where witnesses testify to statements claimed to have been heard by them, and other witnesses testify that they did not hear such statements, the positive testimony, if otherwise credible, is usually entitled to more weight than negative testimony."

It is claimed it was error to give this instruction, because there was no situation disclosed by the evidence to which it applied. In this counsel is mistaken. The witnesses Carroll and Ross on behalf of the defendants testified that plaintiff made such statements to them. The witnesses Zimmerman, Janitz, and Bigby each testified that he was near the plaintiff at the time these statements were claimed to have been made and that he did not hear plaintiff make them or

anything to that effect, and that in his opinion he was near enough to plaintiff to have heard them had they been made.

The claim that the evidence is not sufficient to sustain the finding of contributory negligence is negatived by what has already been said.

By the Court.—Judgment affirmed.

STATE EX REL. YAGER, Appellant, vs. WILCOX, Respondent.

February 3—February 24, 1914.

Opening default: Discretion.

An order refusing to open a default and reinstate a cause is a discretionary order and will not be disturbed unless there was an abuse of discretion.

APPEAL from a judgment of the circuit court for Polk county: FRANK A. ROSS, Circuit Judge. *Affirmed.*

Action of *quo warranto,* involving the title to the office of school district director. The action was commenced in the spring of 1911 in the circuit court for Polk county, was continued for cause shown at the February, 1912, term of court, was on the calendar for trial at the September, 1912, term of court, and when regularly reached on the 21st day of that month there was no appearance for the relator and judgment of dismissal was ordered. November 25, 1912, appellant moved to set aside the default and reinstate the case upon affidavits showing that there had been some negotiations for settlement before the September term; that Mr. Dorothy, the local attorney for the appellant, supposed that a settlement had been arranged between Mr. McGhee (an attorney of St. Paul, who was also acting for the appellant and who died September 19th) and the respondent, and for that reason was not present when the case was reached for trial. This motion

was opposed by affidavits tending to show that the settlement negotiations had failed and that appellant personally knew that fact on the 18th of September. It also appeared that the term of office had expired and that another person was holding the same when the action was dismissed, so that the only real question between the parties had become one of costs. The court denied the motion to reinstate the case and rendered judgment of dismissal, from which judgment this appeal is taken.

The cause was submitted for the appellant on the briefs of *Frank B. Dorothy,* and for the respondent on that of *Kennedy & Yates.*

WINSLOW, C. J. An order refusing to open a default and reinstate a cause is a discretionary order. No abuse of discretion appearing in the present case, the judgment must be affirmed.

By the Court.—It is so ordered.

GUARANTEED INVESTMENT COMPANY, Appellant, vs. ST. CROIX CONSOLIDATED COPPER COMPANY, Respondent.

February 3—February 24, 1914.

Ejectment: Pleading: Equitable counterclaim: Adequate legal defense: Demurrer: Costs upon failure to plead over.

1. In ejectment a counterclaim for equitable relief cannot be sustained if the cause of action alleged therein constitutes a good legal defense and the defendant has a complete and adequate remedy at law as efficient as in equity.
2. In a proper case an equitable defense may be made in an action of ejectment where the defense at law is not adequate and a good cause of action in equity is pleaded.
3. Where, upon overruling a demurrer to a counterclaim, $10 costs of motion were imposed solely as a condition of plaintiff's right to serve a reply, but no reply was served, it was error to include such costs in a judgment against plaintiff.

APPEAL from a judgment of the circuit court for Douglas county: FRANK A. ROSS, Circuit Judge. *Reversed.*

This is an action of ejectment brought to recover the real estate described in the complaint. The defendant answered to the effect that the plaintiff bases its claim on two tax deeds, and that it never was in possession of the property and that the three years statute of limitation had run against it. Defendant further answered by way of counterclaim, setting up that it is the owner in fee simple and in possession of the property described in the complaint, that the plaintiff makes claim to the land adverse to the defendant's said title, and that in truth and in fact the plaintiff has no interest or estate in said premises of any name or nature; and demands judgment that the plaintiff take nothing by this action, that its complaint be dismissed and the claim of the defendant to said premises be established against any claim of the plaintiff, that the plaintiff be forever barred against having or claiming any right or title to said premises adverse to this defendant, that plaintiff release to this defendant all claims to said lands and pay the costs of this action, and that defendant have such other relief as may be just and equitable. The plaintiff demurred to the defendant's counterclaim on the grounds (1) that the said counterclaim does not state facts sufficient to constitute a cause of action; and (2) that the cause of action stated or attempted to be stated is not pleadable as a counterclaim in this action.

The court below overruled the demurrer of the plaintiff to the defendant's counterclaim and required the plaintiff to pay $10 costs of motion as a condition of serving a reply to said counterclaim. The plaintiff having failed to reply to the counterclaim, the court ordered judgment for the defendant and against the plaintiff that the plaintiff take nothing by this action, that its complaint be dismissed, that the claim of the defendant to the premises described in the complaint be established against any claim of the plaintiff, that the plaint-

iff and all persons claiming under it since the filing of the notice of the pendency of the action be forever barred against having or claiming any right, title, or interest in or to said premises adverse to the defendant, and that the plaintiff release to the defendant all claim to said lands and pay the costs and disbursements of the action, together with $10 costs of motion. Judgment was entered accordingly, from which this appeal was taken.

The cause was submitted for the appellant on the brief of *L. A. Doolittle,* and for the respondent on that of *John Brennan.*

KERWIN, J. The first contention made by counsel for appellant is that the counterclaim was not proper, because if proven it would constitute a legal defense to the cause of action set out in the complaint, therefore the defendant cannot be permitted, by setting up such fact as a counterclaim, to change the nature of the trial so as to secure a trial before the court without a jury. Upon this point counsel relies upon the following cases: *Appleton Mfg. Co. v. Fox River P. Co.* 111 Wis. 465, 87 N. W. 453; *Harley v. Harley,* 140 Wis. 282, 122 N. W. 761; *Page v. Kennan,* 38 Wis. 320; *Lawe v. Hyde,* 39 Wis. 345; *Pennoyer v. Allen,* 51 Wis. 360, 8 N. W. 268; *Brown v. Cohn,* 88 Wis. 627, 60 N. W. 826. The contention of counsel for appellant under this head involves two propositions: (1) Whether the counterclaim states a good cause of action in equity; and (2) whether, if so, such cause of action is pleadable as a counterclaim. If the cause of action alleged in the counterclaim constitutes a good legal defense and the defendant has a complete and adequate remedy at law, as efficient as in equity, his counterclaim cannot be sustained.

In *Appleton Mfg. Co. v. Fox River P. Co., supra,* it was held that in ejectment neither the running of the statute of limitation nor facts constituting an estoppel *in pais* can prop-

erly be pleaded as a counterclaim under sec. 3078, Stats. (1898), each being available as a legal defense.

In *Harley v. Harley, supra,* the holding was to the same effect, namely, that a legal defense is not pleadable as a counterclaim in an action of ejectment.

In *Page v. Kennan, supra,* it was held that the complaint under sec. 29, ch. 141, R. S. 1858, should state facts showing the nature and validity of defendant's claim which constituted a cloud upon plaintiff's title to the land in question, and the complaint was held bad on demurrer.

In *Lawe v. Hyde, supra,* it was held that the defendant in ejectment cannot generally set up a counterclaim resting on legal title; but this case recognizes the general doctrine that an equitable defense may be made by counterclaim in a proper case. See 39 Wis. 354.

In *Pennoyer v. Allen, supra,* it was held that equitable relief by injunction against bringing action was not proper, and that the counterclaim did not state an equitable defense; that the case made by the counterclaim was merely a defense at law.

In *Brown v. Cohn, supra,* it was held that facts which merely constitute a legal defense are not the proper subjects of a counterclaim.

In the instant case the facts pleaded show that defendant has an adequate remedy at law, hence it is not entitled to equitable relief. In a proper case an equitable defense may be made in an action of ejectment where the defense at law is not adequate and a good cause of action in equity is pleaded. *Lombard v. Cowham,* 34 Wis. 486; *Lawe v. Hyde,* 39 Wis. 345; *Grignon v. Black,* 76 Wis. 674, 45 N. W. 122, 938; *Du Pont v. Davis,* 35 Wis. 631; *Cornelius v. Kessel,* 58 Wis. 237, 16 N. W. 550; secs. 3078, 3186, Stats. The defendant having an adequate remedy at law, the demurrer should have been sustained.

It is further insisted by counsel for appellant that the

court erred in awarding to the defendant in the judgment $10 costs of motion. In this we think the appellant is right. This $10 costs was imposed solely as a condition of the plaintiff serving a reply to the counterclaim, hence no authority existed for taxing it as costs against the plaintiff on failure to reply. *State ex rel. Rice v. Chittenden,* 107 Wis. 354, 83 N. W. 635; *Schroeder v. Richardson,* 101 Wis. 529, 78 N. W. 178; *Case v. Fuldner,* 110 Wis. 568, 86 N. W. 163; *Schmidt v. Joint School Dist.* 146 Wis. 635, 132 N. W. 583.

By the Court.—The judgment of the court below is reversed, and the cause remanded for further proceedings according to law.

CITY OF SUPERIOR, Respondent, vs. ALLOUEZ BAY DOCK COMPANY, Appellant.

February 3—February 24, 1914.

Taxation: Income tax of corporation, where payable: By whom to be collected: Remedies: Action, where brought.

1. For the purposes of taxation under the state Income Tax Law, the *situs* of the income of a corporation is not at the state capital, but in the town, city, or village in which the corporation is located.
2. The tax is to be paid to such town, city, or village, and if not paid is to be collected by the local authorities, not by the state.
3. All remedies and actions given for collection of taxes on personal property are available for the collection of the income tax, including taxes of corporations.
4. Under sec. 1107*a*, Stats., an action for the collection of an income tax may be brought in the circuit court.

APPEAL from an order of the circuit court for Douglas county: FRANK A. ROSS, Circuit Judge. *Affirmed.*

This action was brought by the plaintiff, a municipal corporation, in the circuit court for Douglas county to recover

the amount of the income tax of 1912 assessed against the defendant. The complaint alleges that the tax was assessed against the defendant and placed upon the tax roll of plaintiff for the year 1912; that the tax roll and warrant were delivered to the treasurer of the plaintiff, *City of Superior,* for collection; that demand of payment was made and refused. The defendant demurred to the complaint on three grounds: (a) No jurisdiction; (b) plaintiff not a proper party plaintiff; and (c) want of facts sufficient to constitute a cause of action.

The cause was submitted for the appellant on the brief of *J. A. Murphy* and *E. C. Lindley,* and for the respondent on that of *Arch'd M'Kay, H. V. Gard,* and *T. L. M'Intosh.*

KERWIN, J. The demurrer raises the right of the plaintiff to maintain the present action. Counsel for appellant discuss in their brief various provisions of the Income Tax Law and arrive at the conclusion that this action cannot be maintained. This contention is based mainly upon the idea that the Income Tax Law does not authorize or contemplate such an action; that while the law provides for collection of the income tax from individuals by local authorities, it does not as to corporations, but that the state collects the income tax from corporations under the provisions of sec. 1215—40, Stats., if the corporation fails to pay.

While the Income Tax Law provides for the assessment of incomes of individuals by the county assessors of incomes, and of corporations by the state tax commission, it further provides that the taxes upon incomes both of individuals and corporations be collected by the local treasurer in the same manner; that all remedies and actions given for collection of taxes on personal property are available for the collection of the income tax, including taxes of corporations. Sec. 1087*m*—1 to sec. 1087*m*—29.

Sec. 1087*m*—20 provides, in effect, that the state tax commission shall complete the assessment of income for each corporation on or before the 15th day of October in each year, and compute the tax thereon, and shall thereupon certify to each county clerk a statement of the assessment of each corporation and the amount of the tax levied against each.

Sec. 1087*m*—21 provides that the tax upon the income of persons other than corporations, joint-stock companies, and associations shall be computed by the county clerk, assisted by the assessor of incomes, and said clerk shall on or before November 1st certify to each town, city, and village clerk the names of all persons whose incomes are assessed in his town, city, or village, and the amount of tax levied against each such person, and such amount shall be entered by the town, city, and village clerks in a separate column designated "income tax" upon the tax roll of the year, and shall be collected as personal property taxes are now collected.

The word "person" in the act is defined to include any individual, firm, copartnership, and every corporation, joint-stock company, or association organized for profit, and having a capital stock represented by shares, unless otherwise expressly provided. Sec. 1087*m*—2. So it will be observed that the word "person" as used in sec. 1087*m*—21 is not confined to natural persons, but includes corporations; therefore the act provides for certification by the county clerk to each town, city, and village clerk of the names of all corporations whose incomes are assessed in his town, city, or village, and that such income taxes shall be collected and paid in the same manner as personal property taxes. And this section further provides that the amount of such tax levied against each person shall be entered in a separate column designated "income tax" upon the tax roll, and be collected and paid as personal property taxes are collected and paid.

Sec. 1087*m*—22, Stats. 1911, provides that all laws not in

conflict with the provisions of the act regulating time, place, and manner of payment of taxes on personal property, the collection thereof by action, distress, or otherwise, shall apply to income tax. And sec. 1087*m*—23 provides:

"The revenue derived from such income tax shall be divided as follows, to wit: ten per cent. to the state, twenty per cent. to the county and seventy per cent. to the town, city or village in which the tax was assessed, levied and collected, which shall be remitted and accounted for in the same manner as the state and county taxes collected from property are remitted and paid."

There can be no doubt from the provisions of the law that the remittance is to be made by the local treasurer to the county treasurer and by him to the state, hence the *situs* of corporation incomes is not at the state capital as contended by counsel for appellant. This conclusion is in harmony with the late decision of this court construing several sections of the Income Tax Law. *Montreal M. Co. v. State,* 155 Wis. 245, 144 N. W. 195.

It is further insisted that, if the city has power to maintain the present action, it must be commenced before a justice of the peace under secs. 1100 to 1107, which sections provide a rather drastic remedy. This remedy is not exclusive. Sec. 1107*a* provides an additional remedy by way of action of debt in the name of the town, city, or village, and after the tax is returned as delinquent in the name of the county for the collection of the tax. The remedy under this section plainly is not confined to justice's court, therefore the present action was well brought in the circuit court for Douglas county. We think it clear that the demurrer was properly overruled.

By the Court.—The order appealed from is affirmed.

KEELEY, Appellant, vs. GREAT NORTHERN RAILWAY COMPANY, Respondent.

February 3—February 24, 1914.

Libel: Pleading: Conclusions not admitted by demurrer: Statements made in legal proceedings: Privilege: Relevancy.

1. A demurrer to a complaint for libel based upon certain statements contained in an affidavit for a new trial does not admit mere conclusions of the pleader, such as that the affidavit and its contents were irrelevant to the motion.
2. The fact that the court to which the affidavit was presented disapproved of and refused to consider it and denied the motion for a new trial, is not conclusive that it was in fact irrelevant or improper.
3. Public interest demands that complainants and suitors and their lawful representatives be at liberty to urge, before any legal tribunal having authority to decide, all matters relevant to the questions to be decided.
4. In order to bring a witness, counsel, or party in a litigation within the rule of absolute privilege, it is only necessary to show that the alleged slanderous or libelous words, at the time when made or published, were clearly relevant to the pending legal inquiry in which they were uttered or used.
5. In a complaint for libel based upon statements in an affidavit used by defendant upon a motion for a new trial in another action, allegations charging defendant with bad faith in presenting such affidavit, with lack of reasonable belief in the truth thereof, and with knowledge that it was false and malicious, do not suffice to deprive defendant of the defense of absolute privilege if the affidavit was in fact relevant to such motion.
6. In legal proceedings, if the matter be relevant but false in fact, the law undertakes to punish for perjury, but civil damages are not recoverable. If irrelevant, false, and uttered or published with express malice or without any *bona fide* belief in its truth or relevancy, damages may be recovered in a civil action.
7. Where, in an action against a railway company by the widow of an employee whose death is alleged to have been caused by negligence, plaintiff recovered a verdict based largely upon the

testimony of one man, an affidavit for a new trial impugning the character of the plaintiff for chastity, particularly in respect to her relations with such witness, was relevant as tending to show a motive on his part for falsifying, and, whether or not it was false, or presented in bad faith, was absolutely privileged.

APPEAL from an order of the circuit court for Douglas county: FRANK A. ROSS, Circuit Judge. *Affirmed.*

The appeal is from an order sustaining a demurrer to the complaint.

The complaint in substance set forth that on May 13, 1907, the husband of plaintiff, while in the employment of defendant, was killed in consequence of defendant's negligence; that she brought an action against the defendant for damages under the death statute and recovered after a trial in which she was a witness in her own behalf with reference to formal and uncontested points, and in which an employee of the defendant named Harty was called as a witness by and for the plaintiff and gave relevant and material testimony tending to establish the liability of defendant. After verdict for the plaintiff defendant moved for a new trial on six specified grounds, three relating to errors of law by the court and the other three somewhat general and ambiguous, namely, because the verdict was contrary to law; because the verdict was contrary to the evidence; and because the verdict was for excessive damages. Attached to and made part of the motion papers was an affidavit of one Sandager, a detective in the employment of defendant, made on July 23, 1908, containing false, defamatory, and libelous matter with reference to plaintiff therein set forth, reflecting upon the chastity of the plaintiff. It is averred that this affidavit and the statement above referred to were wholly and entirely immaterial, irrelevant, and not pertinent to any issues involved in said action or on said motion for said new trial, and that said affidavit and statements were not material, pertinent, or relevant to any matter or subject in said action, or considered, or

proper to be considered, on said motion, and that neither said affidavit nor any of the statements therein contained nor any of the statements quoted therefrom were proper to be used or filed in said action or upon said motion, which facts were well known to the defendant and its attorneys and counsel at and prior to the time of making and filing said affidavit and statements. The defendant, acting by and through its attorneys, at the hearing of the motion for a new trial, in the presence of the circuit judge and others, read said affidavit and statements in open court. The presiding judge filed an order in said court denying defendant's motion for a new trial, which order contained the following statement:

"The affidavits of Zearfoss, Barr, and Sandager presented by defendant's counsel, in the opinion of this court, are improper and ought not to be considered and they are not considered on the decisions of the several motions."

This order and the decision of the circuit judge were affirmed by the supreme court of this state on the appeal of the defendant therefrom. The statements contained in said affidavit and quoted were wholly and entirely false, and this fact was well known to the defendant at and prior to the time of filing and reading of said affidavit. On the day the affidavit was presented and filed in the circuit court, plaintiff caused to be served on the defendant a notice in writing advising the defendant of the filing of said libelous affidavit and statements by its said attorneys, but the defendant failed and neglected to take any action of any kind disapproving of the conduct of its said attorneys and counsel or in any manner disaffirming or repudiating such conduct or such libelous statements, but on the other hand, after receipt of this notice, by and through its attorneys, caused and procured said affidavit containing the alleged libelous statements to be filed in the office of the clerk of the circuit court for Eau Claire county and thereafter to be filed with the clerk of the supreme court of the state of Wisconsin, and failed and neg-

lected to make any effort or request to withdraw from the files said affidavit and such statements therein contained. It is further averred that the acts and conduct of said Sandager and of said attorneys were fully ratified, approved, and confirmed by the defendant, and that the said acts and conduct were malicious, vindictive, and with the intention and for the purpose of injuring, damaging, and destroying the good name and reputation of the plaintiff and to cause her shame, humiliation, disgrace, and degradation. It is also averred that the plaintiff has always been and is now a woman of chaste character and of good reputation.

The cause was submitted for the appellant on a brief signed by *Dietrich & Dietrich,* attorneys, and *E. E. Collins,* of counsel, and for the respondent on that of *J. A. Murphy.*

For the appellant it was contended, *inter alia,* that matter which is impertinent is only conditionally privileged, and if false and malicious is actionable. *Jennings v. Paine,* 4 Wis. 358; *Calkins v. Sumner,* 13 Wis. 193; *Larkin v. Noonan,* 19 Wis. 82; *Noonan v. Orton,* 32 Wis. 106; *Schultz v. Strauss,* 127 Wis. 325, 106 N. W. 1066; *Joseph v. Baars,* 142 Wis. 390, 125 N. W. 913; *Myers v. Hodges,* 53 Fla. 197, 44 South. 357; *Cottrill v. Cramer,* 43 Wis. 242; *Eviston v. Cramer,* 47 Wis. 659, 3 N. W. 392; *Cochran v. Melendy,* 59 Wis. 207, 18 N. W. 24; *Servatius v. Pichel,* 34 Wis. 292. The matter complained of was not relevant because in the nature of impeaching evidence, which is not ground for a new trial in this state. *Martineau v. May,* 18 Wis. 54; *Hooker v. C., M. & St. P. R. Co.* 76 Wis. 542, 44 N. W. 1085; *Curran v. A. H. Stange Co.* 98 Wis. 598, 74 N. W. 377; *Knopke v. Germantown F. M. Ins. Co.* 99 Wis. 289, 74 N. W. 795; *Taylor v. U. S.* 89 Fed. 954; *Loucheine v. Strouse,* 49 Wis. 623, 6 N. W. 360; *Kelley v. G. N. R. Co.* 139 Wis. 448, 121 N. W. 167; *Hyde v. McCabe,* 100 Mo. 412, 13 S. W. 875; *King v. McKissick,* 126 Fed. 215; *Moore*

v. Manufacturers' Nat. Bank, 123 N. Y. 420, 25 N. E. 1048; *Union Mut. L. Ins. Co. v. Thomas,* 83 Fed. 803.

To the proposition that the alleged libelous matter was absolutely privileged, counsel for the respondent cited, among other cases, *Schlag v. C., M. & St. P. R. Co.* 152 Wis. 165, 139 N. W. 756; Odgers, Libel & S. (1st ed.) 191; Newell, Slander & L. 423, 425, 443, 450; *Revis v. Smith,* 18 C. B. 126; *Warner v. Paine,* 2 Sandf. 195; *Terry v. Fellows,* 21 La. Ann. 375; *Hoar v. Wood,* 3 Met. 193; *Hartsock v. Reddick,* 6 Blackf. 255; *Hunckel v. Voneiff,* 69 Md. 179, 14 Atl. 500; *Lea v. White,* 4 Sneed (36 Tenn.) 111; *Myers v. Hodges,* 53 Fla. 197, 44 South. 357; *Lauder v. Jones,* 13 N. Dak. 525, 101 N. W. 907; *Burke v. Ryan,* 36 La. Ann. 951; *Buschbaum v. Heriot,* 5 Ga. App. 521, 63 S. E. 645; *Suydam v. Moffatt,* 1 Sandf. 459; *Bibb v. Crawford,* 6 Ga. App. 145, 64 S. E. 488.

TIMLIN, J. The demurrer must be taken to admit the good character, chastity, and good reputation of the plaintiff and the falseness of the accusations against her contained in the affidavit of Sandager, also the agency of the defendant's attorneys for defendant in procuring and filing this affidavit and the ratification by defendant of their acts in so doing by neglect, after notice, to take any action to withdraw or repudiate said affidavit or the libelous statements therein contained. On the other hand, it cannot be taken to admit the pleader's conclusions that the affidavit and its contents were irrelevant, because the facts upon which such conclusions are based are set forth in the complaint. The case is, from one viewpoint, well calculated to arouse sympathy for the plaintiff and indignation against the defendant. The latter, upon motion for a new trial in the personal injury action [*Keeley v. G. N. R. Co.*] reported in 139 Wis. 448, 121 N. W. 167, presented the affidavits of Zearfoss and Barr and that of its

detective, Sandager, the first two suggesting that one Harty, a witness for the plaintiff in that action, upon whose testimony the verdict largely rested, was a liar and perjurer, and the third charging that he was a self-confessed thief, but also containing, among other things, actionable aspersions upon the chastity of plaintiff resting upon the hearsay statements of this man Harty, whose sworn testimony they at the same time contended was unworthy of belief. These hearsay statements were supplemented by a somewhat vague statement of the detective, Sandager. But sympathy and indignation are emotions which must be laid aside in the decision of legal controversies by those who would hold with an even hand the scales of justice. There is also another aspect of the case which may have presented itself persuasively to the attorneys by and through whom the defendant acted. Harty's testimony largely turned the case against defendant, and there was considerable showing of recklessness of statement on his part. Professional zeal may have made the counsel unduly suspicious of those opposed and unduly credulous of everything which made in their favor, but this is the ordinary mental condition of litigants and frequently of their counsel. If the illicit relations charged existed, a motive for falsifying by Harty would be shown and he could no longer be considered a disinterested witness as he appeared to the court and jury on the trial. The case was close enough on the evidence so that this consideration might induce the learned circuit court to exercise his discretion in granting a new trial if he believed the verdict unjust. The fact that the judge apparently disapproved of this attack upon the reputation of the plaintiff, and also denied the motion for a new trial as he lawfully might do, is immaterial. The affidavit was just as relevant on the motion for a new trial denied in this way as it would have been had the trial court been induced thereby to grant a new trial. *Schlag v. C., M. & St. P. R. Co.* 152 Wis. 165, 139 N. W. 756, and cases cited.

To the ordinary observer it might and no doubt often does appear that court proceedings would be greatly improved by more courteous and considerate treatment of parties and witnesses, and to a great extent this is true. But this courtesy cannot be enforced to the extent of excluding relevant matters from the consideration of the court, for we are not to suspend the search for relevant truth for the sake of courtesy. The paramount public interest here intervenes and overrides considerations of mere private right as between the parties. It is not out of tenderness to the calumniator or the bearer of false witness that the law regards certain communications as absolutely privileged. But public interest demands that complainants and suitors and their lawful representatives be at liberty to urge, before any legal tribunal having authority to decide, all matters relevant to the questions to be decided. A communication may be absolutely or conditionally privileged.

"An absolutely privileged communication is one in respect of which, by reason of the occasion upon which it is made, no remedy can be had in a civil action of slander or libel." "A conditionally privileged publication is a publication made on an occasion which furnishes a *prima facie* legal excuse for the making of it; and which is privileged unless some additional fact is shown, which so alters the occasion as to prevent its furnishing a legal excuse. The additional fact which in the majority of cases is required to destroy this conditional privilege, is malice, meaning bad intent." *Noonan v. Orton,* 32 Wis. 106.

In *Schultz v. Strauss,* 127 Wis. 325, 106 N. W. 1066, the statements of a witness before a grand jury were held to be absolutely privileged; and in *Jennings v. Paine,* 4 Wis. 358, a relevant statement by an attorney in argument was held to be entitled to the same privilege. In *Larkin v. Noonan,* 19 Wis. 82, charges otherwise libelous and maliciously made, embraced in a petition to the governor for the removal of a sheriff from office, but relevant to the removal, were held not

sufficient to support an action for libel. In *Calkins v. Sumner,* 13 Wis. 193, a witness in an action was sued for slander in giving his testimony, and it was ruled that the defendant was not liable even if the charge was made by him maliciously, if what he testified to was relevant to the subject of inquiry.

It is contended here that the demurrer admits these averments of the complaint which charged lack of good faith, want of reasonable belief in the truth of the affidavit made against the plaintiff, and knowledge on the part of the defendant that the affidavit in question was false and malicious, hence that the defendant cannot shelter itself behind a plea of privilege. This would be true as to conditional privilege. But this complaint shows on its face that the court had jurisdiction to entertain the motion and that the matter complained of was relevant to the inquiry upon this motion, and in this respect shows a case of absolute privilege within the rule of *Jennings v. Paine,* 4 Wis. 358; *Calkins v. Sumner,* 13 Wis. 193; *Larkin v. Noonan,* 19 Wis. 82; *Schultz v. Strauss,* 127 Wis. 325, 106 N. W. 1066. The cases of *Cottrill v. Cramer,* 43 Wis. 242; *Eviston v. Cramer,* 47 Wis. 659, 3 N. W. 392; and *Cochran v. Melendy,* 59 Wis. 207, 18 N. W. 24, were cases of communications conditionally privileged and are not in point here.

In order to bring a witness, counsel, or party in a litigation within the rule of absolute privilege, it is only necessary to show that the alleged slanderous or libelous words, at the time when made or published, were clearly relevant to the pending legal inquiry in which they were uttered or used. Nothing less than this would be an adequate protection. Odgers, Libel & S. 191; *Hoar v. Wood,* 3 Met 193; *Laing v. Mitten,* 185 Mass. 233, 70 N. E. 128. Where slanderous or libelous words employed in such a proceeding are irrelevant they fall within the rule of conditional privilege, and if they are shown to be false and not put forward with any *bona fide*

belief in their truth or their relevancy, or any other ground of actual malice be shown, the conditional privilege is lost and the utterer liable. Without approving everything said therein we may here cite *Myers v. Hodges,* 53 Fla. 197, 44 South. 357; *Lauder v. Jones,* 13 N. Dak. 525, 101 N. W. 917. In some of the cases and text-books cited the distinction between absolute and conditional privilege is not accurately stated, as in Newell on Defamation, Slander and Libel, page 423; but see page 425 of the same work. Cases from other courts may also be found which ignore the distinction between absolute and conditional privilege; here made to rest upon the nature of the judicial proceeding and the relevancy of the matter complained of. But such cases are not the law of this state. In legal proceedings, if the matter be relevant but false in fact, the law undertakes to punish for perjury, but civil damages are not recoverable. If irrelevant, false, and uttered or published with express malice, damages may be recovered in a civil action. If irrelevant and false, but uttered or published without actual as contradistinguished from imputed malice, it usually falls within the rule of conditional privilege, depending somewhat upon the degree of its irrelevancy; for if the matter is very obviously irrelevant, that circumstance may impugn the good faith of the utterer or publisher and either take the case out of the rule of conditional privilege or be considered evidence to support a finding of express malice. *Sherwood v. Powell,* 61 Minn. 479, 63 N. W. 1103, 29 L. R. A. 153; *McLaughlin v. Cowley,* 127 Mass. 316; *S. C.* 131 Mass. 70.

By the Court.—Order affirmed.

WALKER and others, Respondents, vs. ROCKMAN, Appellant.

February 3—February 24, 1914.

Ejectment: Judgment: When is on the merits: New trial: Notice of motion: Undertaking: Approval: Service of copy: Justification of sureties.

1. In ejectment, defendant set up title in himself and demanded judgment that the title and right of possession were in him. The cause was tried by the court. At the close of plaintiffs' testimony defendant moved for judgment dismissing the complaint because plaintiffs had failed to establish title in themselves. The court granted the motion and found as a conclusion of law that defendant was entitled to judgment dismissing the action upon the merits, and judgment was entered accordingly in that form. *Held*, that the judgment was one on the merits and was proper. *Comstock v. Boyle*, 134 Wis. 613, distinguished.
2. Plaintiffs in ejectment being entitled to a new trial as a matter of right under sec. 3092, Stats., it was immaterial that the notice of motion therefor was not served on defendant.
3. An order for a new trial in ejectment, granted under sec. 3092, Stats., becomes effective upon payment of the statutory costs and the filing of an undertaking which in form complies with the statute and the order.
4. The statute does not, in such case, require the court to approve the undertaking. *Dickinson v. Smith*, 139 Wis. 1, distinguished.
5. Nor is the provision in sec. 2702, Stats., relating to the service of a certified copy of the undertaking, applicable to actions of ejectment.
6. The sureties in the undertaking are, under sec. 3092, Stats., required to justify only in case objection is made to their sufficiency. Defendant has the right to make such objection and to have proceedings stayed until the sureties justify; and if they fail to do so and plaintiff fails to furnish a new and sufficient undertaking, defendant is entitled to have the order vacating the judgment set aside as a matter of course.

APPEAL from a judgment of the circuit court for Barron county: FRANK A. ROSS, Circuit Judge. *Affirmed.*

This is an action of ejectment in which the plaintiffs claim title and right of possession. The answer denied the alle-

gations of the complaint and set up title in the defendant under certain tax deeds and demanded judgment decreeing that the title and right of possession were in the defendant. At the close of plaintiffs' testimony the defendant moved for judgment dismissing the complaint because plaintiffs had failed to establish title in themselves. The court granted the motion, and as a conclusion of law found that the defendant was entitled to judgment dismissing the action upon the merits and that the defendant recover costs. A judgment was accordingly entered on November 11, 1912, which adjudged that the action be dismissed upon the merits. On December 5, 1912, one of the attorneys for the plaintiffs filed an affidavit reciting that the costs had been paid and that plaintiffs applied for a new trial in the action as allowed by law. Thereafter on December 6, 1912, the court entered an order vacating the judgment and granting a new trial upon condition that the plaintiffs execute and file an undertaking with sufficient sureties in the sum of $200, to the effect that they would pay all costs and damages which might be finally awarded to the other party in the action, such sureties to justify their responsibility as required by law. This order was entered without notice to the defendant or his attorney. It appears by inference that an undertaking was filed, but through some oversight the same was not returned with the record to this court. The case was noticed for trial at the March, 1913, term of the circuit court for Barron county, and thereupon the defendant moved for an order vacating and setting aside the order granting a new trial, the defendant appearing specially for the purpose of making such motion. The grounds on which it was sought to set aside the order were as follows: (1) The court had no power to make the same, and the order was erroneous because the plaintiffs were not entitled to a new trial. (2) No notice of the application for a new trial was served on defendant or his attorney. (3) The order as granted was inoperative as an order vacating

the judgment and granting a new trial. (4) Neither the order nor a copy thereof was served on the defendant or his attorney. (5) The undertaking authorized by the order was not served upon the defendant or his attorney, nor was the undertaking nor the responsibility of the sureties approved by the court or judge. (6) The application and affidavit upon which the order was based were insufficient to authorize any order affecting the judgment.

The defendant's motion was denied, and thereupon the defendant refused to take any part in the trial of the action. The plaintiffs submitted their proofs to the court and upon them the court made findings of fact and conclusions of law upon which judgment was entered in favor of the plaintiffs and against the defendant, adjudging the plaintiffs to be the owners of and entitled to the property in controversy. The defendant appeals from this judgment.

For the appellant the cause was submitted on the brief of *W. F. Bailey.*

For the respondents there was a brief by *C. C. & A. E. Coe,* and oral argument by *A. E. Coe.*

BARNES, J. 1. The judgment first entered was in form one on the merits, and we think it is quite clear that it was so in fact. *Amory v. Amory,* 26 Wis. 152; *Williams v. Hayes,* 68 Wis. 248, 32 N. W. 44; *Nat. F. & P. Works v. Oconto City W. S. Co.* 105 Wis. 48, 58, 81 N. W. 125; *Durant v. Essex Co.* 7 Wall. 107; *Swan L. & C. Co. v. Frank,* 148 U. S. 603, 13 Sup. Ct. 691. The contentions that under secs. 3084, 3086, and 3092 a judgment of nonsuit only could have been granted in this case is not correct. Sec. 3084 deals with the form of verdicts in ejectment actions and does not affect the question, because a jury was waived and the case was tried by the court. Sec. 3086 provides that the judgment shall be entered in accordance with the verdict *or decision of the court.* The judgment was entered in conformity with

the court's decision. There is nothing that can be read out of sec. 3092 prohibiting the entry of a judgment other than one of nonsuit where the plaintiff fails to establish title in an ejectment action. Nor has this court decided that the judgment here rendered was improper. On the contrary, it has decided that such a judgment may be entered. *Menominee River L. Co. v. Seidl,* 149 Wis. 316, 135 N. W. 854. The case of *Comstock v. Boyle,* 134 Wis. 613, 114 N. W. 1110, cited by the appellant as holding that the only proper judgment to render in the case before us was one of nonsuit, does not so hold. There the answer was a general denial. Defendant did not, as here, set up title in himself and ask for a dismissal of the complaint on the merits. The plaintiff failed to appear at the trial and defendant proceeded to prove his title and try the case on the merits, and took a judgment decreeing that the plaintiff had no right, title, or interest in the premises in dispute. The case was disposed of in this court on the theory that plaintiff had the right to insist that in his absence from the trial the relief granted should not be greater than that asked for in the answer, and that plaintiff by his nonappearance in effect submitted to a voluntary nonsuit. The court does not decide that, under such an answer as was here interposed, where defendant specifically sets forth his title and asks for a dismissal of the complaint on the merits, he could not have taken judgment in accordance with the prayer of the answer, upon plaintiff failing to prove his cause of action. The defendant was entitled to a judgment on the merits where the plaintiff failed to prove title, as well as he would be had he proved a paramount title in himself or established his right by adverse possession, provided the court saw fit to grant such a judgment.

2. The plaintiffs were entitled to a new trial as a matter of right, hence it was immaterial whether a notice of motion therefor was served or not. The statute did not require the court to approve of the undertaking. What is said in refer-

ence to the approval of an undertaking by the court in such a case in *Dickinson v. Smith,* 139 Wis. 1, 120 N. W. 406, must be read in connection with the facts in that case where the court did approve of the undertaking.

There is no doubt that under sec. 3092, read in connection with the statutes relating to bail on arrest therein referred to, the defendant had the right to except to the sufficiency of the sureties and to have them justify in the manner provided for in sec. 2705, Stats. We do not think that the provision of sec. 2702 relating to the service of a certified copy of the undertaking in cases of bail on arrest is applicable to actions of ejectment. The defendant, however, could not be deprived of this right to question the sufficiency of the sureties on the undertaking. In the present instance he did not take the proper steps to avail himself of it. His motion to vacate the order granting the new trial was made before the second trial of the action, and he then knew of the undertaking. His proper procedure, if he was not satisfied with the sureties, was to make his objections to them and ask that they be required to justify in the manner provided by law. In the meantime he would be entitled to an order staying proceedings in the action until the sureties had established their competency, and to an order vacating the former order if they failed to do so and other good and sufficient sureties were not substituted. Appellant insists that the order granting the new trial did not become effective until he had notice thereof and the undertaking was served upon him and he elected not to object to the sufficiency of the sureties or the court found they were sufficient if objection was made. There is no particular reason why an order for a new trial granted under sec. 3092 should not become effective when the statutory costs are paid and an undertaking filed which in form complies with the statute and the order granting the new trial. The statute provides that the new trial shall be granted on condition that certain costs be paid "and that the applicant execute and

file an undertaking, with sufficient sureties, in such sum as the court shall direct, to the effect that he will pay all costs and damages which may be finally awarded the other party." The order here made followed the statute, and we must assume that the undertaking followed the order, because no objection was made to its form at any stage of the proceeding. The sentence following the above quotation reads: "The sureties shall justify their responsibility in the same manner as bail on arrest." Such sureties are required to justify only in case objection is made to their sufficiency. Such objection may never be made. We think it is a fair construction of the statute to hold that the order granting the new trial became effective when the costs were paid and the undertaking was filed, and such is the effect of the decision in *Dickinson v. Smith,* 139 Wis. 1, 120 N. W. 406. The defendant might except to the sureties, and if they failed to justify and plaintiffs failed to furnish a new and sufficient undertaking, the defendant would be entitled to have the order vacating the judgment set aside as a matter of course.

By the Court.—Judgment affirmed.

SHALL, Appellant, vs. MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, Respondent.

February 4—February 24, 1914.

Unlawful search: Wilful wrong: Damages: Mental suffering: Punitory damages: Evidence: Consent to search.

1. Where employees of the defendant railway company, without warrant or authority of law, at midnight, when plaintiff, a widow, was alone in her dwelling house, without her consent entered and searched the house for the avowed purpose of obtaining information or evidence to be used in an effort to convict her son of burglary, there was a wilful wrong affecting her personal security and she is entitled to damages for

her mental suffering caused thereby. It was error, therefore, to exclude evidence showing how the entry and search affected her feelings and health, her nervous system, sleep, and appetite.

2. Evidence in such case that plaintiff walked around with a lamp after defendant's employees while they were making the search, and said they were welcome to any information they might find in her house, did not establish that she consented to the search, in face of direct testimony that she objected thereto and where the trial court excluded evidence offered to show that after one of said employees showed his star she was afraid to make further resistance.

3. Punitory damages were not recoverable under the evidence in this case.

APPEAL from a judgment of the circuit court for Douglas county: FRANK A. ROSS, Circuit Judge. *Reversed.*

This action was brought to recover damages for an unlawful search of the plaintiff's premises made in the nighttime by Charles Busche and J. C. Olson while in the employ of the defendant and acting within the scope of their duty. The search of the plaintiff's dwelling was made on the 2d day of October, 1912, at about 12 o'clock midnight, by said Busche and Olson for the purpose of discovering property which had been stolen from the roundhouse of the defendant. The said Busche and Olson, while acting as the agents of the defendant, entered the plaintiff's dwelling at the hour mentioned without any search warrant and without the invitation or assent of the plaintiff. The search was made for the purpose of securing evidence against the person or persons who committed a robbery, the theory of Busche and Olson in making such search being that the plaintiff's son was connected with such robbery. The case was tried before a jury and the following verdict returned:

"(1) Was the search of plaintiff's rooms by Olson and Busche made without invitation from or assent thereto by plaintiff? *A.* Yes."

The judge in addition to the verdict rendered found that Olson and Busche at the time they searched the premises

were acting under the terms of their employment and within the scope of their employment, and that their acts in that regard were binding upon the defendant; and further found that the plaintiff, under the undisputed evidence and the verdict of the jury, was entitled to nominal damages only, and assessed such nominal damages at $1.

Motion for new trial was made upon various grounds raising the errors discussed. Judgment was rendered in accordance with the verdict and findings, from which this appeal was taken.

For the appellant there was a brief by *Grace, Hudnall & Fridley,* and oral argument by *George B. Hudnall.*

For the respondent there was a brief by *Luse, Powell & Luse,* and oral argument by *L. K. Luse.*

KERWIN, J. The plaintiff produced evidence tending to show that Busche and Olson were in the employ of defendant at the time in question and engaged in investigation of a supposed theft or burglary committed on the premises of the defendant. They went to the dwelling house of the plaintiff in the nighttime to search it with a view of obtaining evidence connecting plaintiff's son with the crime. Plaintiff is a widow and has two sons and a daughter with whom she lives. On the night in question she was alone in her home, her two sons and daughter being absent. She expected one of the sons home about midnight, and when she heard Busche coming up the stairs supposed it was her son until Busche entered the hallway at the top of the stairs, the plaintiff's dwelling house being in the second story, there being a harness shop below. The stairway comes up from the west and lands at the east part of the house near the dining-room door. There is a door at the bottom of the stairway and also a screen door, which was closed at the time Busche and Olson entered. Busche and Olson entered the house at the time in question without invitation from or assent by plaintiff, and searched the dwelling house with flashlights, going into the

bedroom of the plaintiff's sons and making thorough examination, and also searching other parts of the dwelling. The plaintiff objected to the search. Her older son was at the time in the employ of defendant. After Busche got upstairs and into plaintiff's premises and met plaintiff, he asked if Herbert Shall (plaintiff's son) lived there and was informed by plaintiff that he did. He then called Olson, who was at the foot of the stairs, saying, "Yes, this is the place, come on up." Plaintiff then asked if her son had met with an accident, to which Busche answered, "Oh no, everything is all right." He showed his star and said, "There has been some trouble up at the roundhouse and we are looking for information." Plaintiff asked if he intended to connect her son with "a lowdown robbery," and he replied "Well, we are looking for information." He said that he had searched all the other night employees' houses and that hers was the last one. Plaintiff then begged them not to search the house and said there was nothing there that belonged to them. She said she was a poor, old lady, living there alone, and did not want them to search her house. They searched the dwelling house and afterwards discovered that her son had nothing to do with the burglary. It also appears that they had no search warrant or authority to enter the plaintiff's premises or make the search.

Evidence was ruled out, and rulings excepted to, as to how the entry and search affected the plaintiff's feelings and health; how it affected her nervous system, sleep, and appetite, on the ground that evidence of that character tended to establish an improper measure of damages. The court held that compensation for mental anguish could not be recovered, therefore ruled out all evidence tending to show injury to feelings, humiliation, and disgrace caused by the acts of Busche and Olson, and how the acts of Busche and Olson affected her. Also whether, after Busche showed the star, plaintiff was afraid to make further resistance to the search. Whether such rulings were wrong is the main question on this appeal.

Some stress is placed upon the rulings of the court below to the effect that plaintiff went around with Busche and Olson when they searched and made no objection to their progress, hence it is claimed there was no wilful attempt on their part to do anything against the wishes of plaintiff. But the evidence was sufficient to warrant the jury in finding that both the entry and the search were without invitation and against the assent of the plaintiff. True, plaintiff walked around after Busche and Olson with a lamp while they were making the search and said they were welcome to any information they might find in her house, or words to that effect. But it does not establish that she consented to the search, especially in face of direct testimony that she objected to the search. Moreover, testimony as to whether plaintiff was afraid to make further resistance to the search after Busche showed her his star was ruled out.

To support the rulings of the court below counsel for respondent relies chiefly upon *Summerfield v. Western Union T. Co.* 87 Wis. 1, 57 N. W. 973, and *Gatzow v. Buening,* 106 Wis. 1, 81 N. W. 1003. A careful examination of these cases, we think, will show that they do not support the contention of counsel.

In the case of *Summerfield v. Western Union T. Co., supra,* the action was upon contract to recover damages for negligent delay in delivering a telegram, and it was held that damages were not recoverable for mental distress alone caused by such delay; but in that case, among the cases excepted from the general rule there laid down, are cases of "wilful wrong, especially those affecting the liberty, character, reputation, personal security, or domestic relations of the injured party." Also cases where, by the negligent act of the defendant, physical injury has been sustained.

In *Gatzow v. Buening, supra,* the plaintiff had entered into an agreement with a liveryman for the services of a hearse and carriage for use at the funeral of the former's four-year-old child, which was to be buried from his residence. The

hearse and carriage with teams and drivers were sent to plaintiff's residence in accordance with the agreement. They were caused to be removed by acts of defendants and others at about the time they were needed to carry the body of the child and friends to the grave. The charge in the complaint was that the defendants and others conspired to effect the removal and deprive the plaintiff of their use to humiliate and injure him, and that such acts caused plaintiff great mental distress and loss, besides the loss of the amounts paid for use of the vehicles. Defendants denied the conspiracy or intent to injure and justified their acts under by-laws of a liverymen's association fixing prices and prohibiting letting vehicles below the fixed prices, and that defendants were acting in accordance with their duty to prevent violations of the association's by-laws in doing what they did without malice towards the plaintiff.

It will be seen that in neither of these cases was there any physical interference with the plaintiff, trespass on property, or invasion of personal security of the home. In the latter case it was held that, there having been no physical injury to plaintiff and no personal injury to him of any kind save to his feelings, he could not recover for mental suffering, and that the case did not fall within the exceptions to the rule laid down in the *Summerfield* and other cases. So we think the case at bar is distinguishable from the *Summerfield* and *Gatzow* cases. The exceptions mentioned in the above cases have been referred to with approval in later cases in this court. *Ford v. Schliessman,* 107 Wis. 479, 83 N. W. 761; *Hacker v. Heiney,* 111 Wis. 313, 87 N. W. 249; *Koerber v. Patek,* 123 Wis. 453, 102 N. W. 40.

In *Ford v. Schliessman, supra,* there was no physical interference whatever with the plaintiff. The defendant merely went into the dwelling house of plaintiff in the night and passed through it without the consent of the plaintiff, and it was held that she was entitled to recover damages for the "in-

vasion of her possession and rights." This case recognizes the exceptions to the general rule that damages for mental suffering cannot be recovered where there is no physical interference.

In *Hacker v. Heiney, supra,* it was contended that in the absence of some other actual damage no recovery could be had for injury to the feelings. On this point the court said: "The rule for which the appellant contends has been applied only to cases of negligence, or alleged personal injury, where the mental suffering can result only from the injury and not from the tort," citing the *Summerfield* and *Gatzow* cases. In the case at bar the mental suffering resulted from the wilful and unlawful invasion and search of the plaintiff's dwelling house.

In *Koerber v. Patek, supra,* it was insisted that there could be no recovery for mental suffering occasioned by mutilation of a dead body, because there was no physical interference with plaintiff and no property in the corpse, but it was held that the wilful interference with the dead body was an actionable wrong and an invasion of the rights of relatives entitled to the corpse for burial for which damages for mental suffering could be recovered as compensatory damages. We think the decisions of this court fully justify the right of recovery of damages for mental suffering in the instant case. Other authorities bearing upon the question are: *Dunn v. Western Union T. Co.* 2 Ga. App. 845, 59 S. E. 189; *Smith v. A., T. & S. F. R. Co.* 122 Mo. App. 85, 97 S. W. 1007; *Small v. Lonergan,* 81 Kan. 48, 105 Pac. 27, 25 L. R. A. N. S. 976; *Anonymous,* Minor (Ala.) 52, 12 Am. Dec. 31; *Larthet v. Forgay,* 2 La. Ann. 524, 46 Am. Dec. 554; *McClurg v. Brenton,* 123 Iowa, 368, 98 N. W. 881.

The common law of England from Magna Charta down has always protected the citizen in the occupation of his home free from arbitrary invasion and search. William Pitt voiced the spirit of the law of England when he said: "The

poorest man may in his cottage bid defiance to all the force of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter,—but the King of England cannot enter; all his forces dare not cross the threshold of the ruined tenement." This sacred right is protected by our constitutions, both state and federal, in the following provisions: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Const. U. S. Amend. IV; sec. 11, art. I, Const. Wis.

In the case at bar Busche and Olson, acting for defendant, without warrant or authority of law, at midnight when the plaintiff was alone in her dwelling house, without her consent, entered and searched it for the avowed purpose of obtaining information or evidence to be used in an effort to convict the plaintiff's son of burglary. Nothing could be better calculated to wound the feelings of the plaintiff and humiliate her than such acts. Here there was a wilful wrong affecting the personal security of the plaintiff, if not her liberty, character, reputation, and domestic relations. We think it clear that the plaintiff is entitled to damages for mental suffering caused by the acts of Busche and Olson in entering her dwelling house and making the search complained of, and therefore the court below was in error in excluding the evidence objected to by counsel for defendant.

It is contended by appellant that the question of punitory damages should have been submitted to the jury. We are of opinion that there was not sufficient evidence to carry the question of punitory damages to the jury. *Topolewski v. Plankinton P. Co.* 143 Wis. 52, 126 N. W. 554.

By the Court.—The judgment is reversed, and the cause remanded for a new trial.

STATE EX REL. CHANDLER, Appellant, vs. MAYOR AND COMMON COUNCIL OF THE CITY OF SUPERIOR and others, Respondents.

February 5—February 24, 1914.

Intoxicating liquors: Licenses: Transfer to different locality: Mandamus.

1. Sec. 1565*d*, Stats. 1911, has no bearing on the transfer of a license from one locality to another during the life of such license.
2. If a city council has power to transfer a license issued for one locality to another, such power is discretionary and *mandamus* will not lie to control that discretion.

APPEAL from a judgment of the circuit court for Douglas county: FRANK A. ROSS, Circuit Judge. *Affirmed.*

This is a *mandamus* proceeding brought to compel the city council of the city of Superior to transfer a license from one locality to another during the period covered by it. The facts alleged in the petition and admitted by the return and those set forth in the return and admitted by the relator's demurrer thereto show that the relator was licensed to sell liquor at 812 Tower avenue in the city of Superior from June 30, 1912, to June 30, 1913; that he was ousted from the building occupied by him at 812 Tower avenue because of nonpayment of rent; that he then rented a building at 616 Tower avenue which was not located in any no-license area, and demanded that his license be transferred to such locality, and that his application was denied by the common council on June 9, 1913. On May 29, 1913, the owner of the building at 812 Tower avenue advised the common council that its property was available for use for saloon purposes; that more than the legal limit of liquor licenses had been granted, and that under such circumstances no legal transfer of the relator's license could be made. A remonstrance against granting a license for the building at 616 Tower avenue was filed with the council and was signed by forty-one persons. The council set forth in their return that they refused to make the

transfer because of the protest of property owners in the vicinity, because there were then too many saloons in the locality of 616 Tower avenue, because in their judgment it was for the best interests of the city not to make the transfer, and because they had no power to make it.

The cause was submitted for the appellant on the brief of *Solon L. Perrin,* and for the respondents on a brief signed by *A. V. Gard* and *T. L. McIntosh.*

BARNES, J. The appellant argues that under the provisions of sec. 1565*d,* Stats. 1911, the relator had a clear legal right to have his license transferred. This statute is quoted in full in *State ex rel. Marvin v. Larson,* 153 Wis. 488, 140 N. W. 285, and in *Zodrow v. State,* 154 Wis. 551, 143 N. W. 693. The only portion of it which can have any application to the facts in this case is the following:

"And provided further that licenses be granted or issued to persons for those places or locations for which licenses were issued or granted on or prior to the thirtieth day of June, 1907, unless by reason of a refusal of the owner to lease the same for such purposes, their destruction by fire or the elements or the same be refused by operation of law or under the provisions of this act, then and in either of such cases such license may be issued or granted to some other location."

We fail to see how the portion of the statute quoted can have any bearing on the transfer of a license issued for a given locality to another and different one during the life of such license. Our attention has not been called to any statute which obligates or even authorizes a city council to transfer a license issued for one locality to another. If the power exists at all, which we doubt, it was discretionary and *mandamus* will not lie to control that discretion. Sec. 35, ch. 124, Laws of 1891; *Joseph Schlitz B. Co. v. Superior,* 117 Wis. 297, 93 N. W. 1120; *State ex rel. Davern v. Rose,* 140 Wis. 360 (122 N. W. 751) and cases cited on page 371.

By the Court.—Judgment affirmed.

HILDEN, Respondent, vs. GREAT LAKES COAL & DOCK COMPANY, Appellant.

February 5—February 24, 1914.

Master and servant: Negligence: Injury to servant: Contributory negligence: Evidence: Special verdict: Excessive damages.

1. For the purpose of demonstrating the efficiency of its fire-extinguishing system, defendant's superintendent directed plaintiff, a blacksmith in defendant's employ, to hold a nozzle, about eighteen inches long, attached to twenty-five feet of fire hose. When the water was turned on, the nozzle was jerked out of his hands by the pressure, and struck and injured his shin. The evidence as to the knowledge which the superintendent and plaintiff respectively had as to the conditions, the power to be applied, and the natural action of the water, is *held* to sustain findings by the jury that the superintendent was negligent in directing plaintiff to hold the nozzle alone, and that plaintiff was not guilty of contributory negligence.
2. Refusal to submit a particular question in a special verdict was not error where one of the questions submitted, together with the instructions thereon, sufficiently covered the material fact in issue.
3. It appearing that plaintiff's injuries were painful; that the wound became infected and resulted in an ulcer, although there was no permanent substantial injury except a sensitive scar; that he was unable to work for three or four months; that he was earning from $3 to $3.50 per day; and that his medical expenses amounted to $65, damages in the amount of $900 are not excessive.

APPEAL from a judgment of the superior court of Douglas county: CHARLES SMITH, Judge. *Affirmed.*

Action for personal injury. The defendant maintained on its dock a fire-extinguishing system consisting of a pump, a pipe line, and hose. For the purpose of demonstrating its efficiency before an officer of the company, its superintendent called plaintiff, whose principal employment was that of a blacksmith, to hold the nozzle of a twenty-five foot length of hose. The nozzle was about eighteen inches long, two and

one-half inches at the base, and had an opening of one and one-quarter inches. The pump was then set in operation, and about the time the water started to come through the nozzle plaintiff claims it was jerked out of his hands by the force of the water, struck his shin, and inflicted a cut or bruise that later became infected and resulted in an ulcer.

The jury found (1) that plaintiff was injured by the nozzle; (2) that it was forced from his hands by the pressure of the water; (3) that the superintendent was guilty of a want of ordinary care; (4) that the engineer in charge of the pump was not; (5) that the superintendent's want of ordinary care was the proximate cause of plaintiff's injury; (6) that plaintiff was not negligent; and (7) damages $900. Judgment in favor of plaintiff was entered upon the verdict, and the defendant appealed.

For the appellant there was a brief by *W. P. Crawford,* and oral argument by *H. G. Pickering.*

Victor Linley, for the respondent.

VINJE, J. This case presents the question of the sufficiency of the evidence to sustain the findings that the superintendent was negligent in ordering plaintiff to hold the hose alone, and that plaintiff was not guilty of contributory negligence. As to the first, it is urged that the operation was such a simple, ordinary one and of such a character that the defendant could not reasonably anticipate injury therefrom. The evidence shows that the nozzle was attached to twenty-five feet of two and one-half inch hose, and that when the water was turned on it threw a stream from 75 to 150 feet in length from an orifice of one inch and a quarter. It also shows that under such conditions it is difficult for one man to manage the nozzle or hose owing to the fact that the pressure of the water produces a twisting, jerky motion on the hose. The superintendent knew the size of the hose, the amount of power the pump was capable of exerting, and the

object and extent of the demonstration, and he must or should have known that it was difficult or dangerous for one man to handle a hose of that size if there was to be enough pressure exerted to throw an inch and a quarter stream seventy-five feet or more. The finding of the jury that the superintendent was negligent, approved as it is by the trial court, cannot be disturbed.

As to the finding of no contributory negligence, the same result is reached. It does not appear that the plaintiff was familiar with the action of water forced through a hose, though he had once before assisted in holding the hose while another held the nozzle. Nor does it appear he knew anything about the amount of power that was intended to be used. As soon as the water came, he testified, the nozzle was jerked out of his hand in spite of anything he could do.

Error is assigned because the court refused to include in the special verdict this question submitted by the defendant: "Did Superintendent Summershield know or in the exercise of ordinary care should he have known, at the time he ordered plaintiff to hold the hose, that said work could not safely be done by one man?" The court submitted the question, "Was the superintendent guilty of want of ordinary care on the occasion in question?" and instructed under this question as follows:

"We have to take the circumstances as they were, as they appeared to him on the occasion. Now, taking the position that he was in, the light that he had, and all the circumstances, what do we say there—that he was guilty of want of ordinary care or not in sending the plaintiff to handle the nozzle alone, and with what we may say with reasonable probability that harm might come under the circumstances?"

It thus appears that under the instructions of the court the only question submitted to the jury as to the negligence of the superintendent was whether he failed to exercise ordinary care because he sent the plaintiff alone to handle the

nozzle. The question submitted by the court, together with the instruction, sufficiently covered the material fact in issue.

It is also claimed the damages are excessive. The evidence shows that plaintiff's injuries were painful; that his wound became infected, but that there was no permanent substantial injury except a scar on his leg covered by skin which is more or less thin and sensitive; that he was unable to work for from three to four months; that he was earning from $3 to $3.50 per day, though not steadily employed; and that his medical expenses amounted to $65. Under such circumstances, damages in the amount of $900 cannot be held excessive.

By the Court.—Judgment affirmed.

HAUETER, Appellant, vs. MARTY and another, Respondents.

February 5—February 24, 1914.

Sales: Refusal of vendee to accept: Remedies of vendor: Election: Measure of damages: Time of breach: Market value: Evidence.

1. Under an executory contract for the sale, at a stipulated price, of a specific article of personal property to be delivered at a particular place and at a time determinable by the vendor, if the vendee, upon being notified of the time for delivery, either refuses to accept the property unless upon a material condition not named in the contract, or by neglecting to make any provision for accepting manifests an intention not to accept, the vendor may choose between three courses of action: He may (1) hold the property for the executory vendee and sue for the purchase price and expenses of caring for it; or (2) sell the property as agent for the vendee and recover the difference between the contract price and the fair market value of the property at the place of delivery and time of the breach; or (3) keep the property and recover the difference between the contract price and the fair market value at the time and place for delivery.
2. Having once chosen one of such courses of action, either actually or constructively, the vendor's rights must be vindicated by that method.

3. But where the contract does not relate to specific articles which can be treated as the property of the executory vendee before or at the time of the breach, the vendor's only remedy is to recover the excess, if any, of the contract price over the fair market value at the agreed time and place of delivery.
4. Where plaintiff sold cheese to be delivered at a certain railway station when marketably matured, and thereafter notified the vendees that delivery would be made on a certain date, but the vendees before that date gave notice that they would not accept the cheese until they had first inspected it at the place to which it was to be shipped from said station, and on the date named failed to attend at said station or receive the cheese, there was a breach of the contract on or before said date.
5. If in such case there was no market value for the cheese at the time and place for delivery, the market value at advantageous points for dealing in such property, in connection with necessary expenses in reaching such markets, would be proper evidence of fair value.
6. A sale of the cheese by plaintiff five months after the breach, to which the vendees were not made parties by notice and which was not characterized by any of the essentials to give it evidentiary value, was in this case without probative force upon the question of damages.

APPEAL from a judgment of the circuit court for Green county: GEORGE GRIMM, Circuit Judge. *Affirmed.*

Action for damages for breach of contract. The cause was tried by the court. The findings are within the issues raised by the pleadings. The facts as found, so far as material, are these: It was mutually agreed between plaintiff and defendants that the latter should take of the former a quantity of cheese, July 1911 make, including all his one-pound block limburger, at ten and one-half cents per pound, the same to be delivered at Ridgeway railway station when marketably matured, and there received. The last part of the cheese was ready for delivery July 19, 1911, and defendants were notified that delivery would then occur and to be ready to receive the same. The latter thereupon notified plaintiff that they would not accept the cheese unless first permitted to examine it in Chicago and thereby finding it to be in proper condition.

Plaintiff thereafter held the cheese near Ridgeway until about August 15, 1911, then placed the same in cold storage in Chicago, insured in his own name, where he caused the same to be kept until December 15, 1911, and then sold for four and three-fourths cents per pound. At the time of the breach of contract, July 19, 1911, and for several months thereafter, such cheese as that involved was marketable at Ridgeway station at a price in excess of what defendants agreed to pay, while the market price for such cheese during the same time in Chicago was somewhat more and around thirteen cents per pound. After defendants refused to accept according to the contract, plaintiff could readily have disposed of the cheese for a full price at the agreed place of delivery; but made no effort to do so.

Upon such facts the conclusion was reached that plaintiff was without any substantial ground for complaint because he had not suffered any damage by reason of the breach of contract complained of. Judgment was thereupon rendered in defendants' favor dismissing the action with costs.

For the appellant there was a brief by *Fiedler & Fiedler,* and oral argument by *E. C. Fiedler.*

E. D. M'Gowan, for the respondents.

MARSHALL, J. In case of a person offering, for a stipulated price, to sell and deliver to another at a particular place and at a time, depending upon circumstances determinable by such person, any specific article of personal property, and such other accepts the offer and, thereafter, such person names the time when delivery will be made, but such other either notifies such person that he will not accept the property under the contract, except upon a material condition not named therein or neglects to make any provision for duly accepting, thus manifesting a refusal to comply with the contract, a remediable wrong thereby accrues to the executory vendor

for which the law affords him a choice of three courses of action.

According to the facts of this case, as found by the trial court and as claimed by counsel for appellant as well, a wrong was perpetrated by respondents. Let it be supposed within the stated principle appellant were to make the choice referred to, the law will not permit one to be fickle about such a matter. It gives him the right of choice, but no right to choose but once. So having chosen, either actually or constructively, his rights must be vindicated by the one method or not at all, judicially.

The three courses of action mentioned are these:

(a) Hold the property *in persona* or by some appropriate agency for the executory vendee and sue upon the contract for the purchase price and reasonable expenses incurred in caring for the same.

(b) Sell the property as agent for the executory vendee and sue to recover the difference between the contract price and the fair market value of the same at the agreed place for delivery at the time of the breach, in which case the price realized by the sale on the executory vendee's account, if conducted with any reasonable degree of fairness with reference to fixing the fair market value at the vital time mentioned, will be evidence thereof, of more or less significance according to circumstances. *Pratt v. S. Freeman & Sons Mfg. Co.* 115 Wis. 648, 92 N. W. 368; *Gross v. Heckert,* 120 Wis. 314, 97 N. W. 952.

(c) Keep the property and recover the difference between the contract price and the fair market value at the time for and place of delivery.

Now whether this case be strictly within the principle stated is not very clear. It only applies to sales of specific articles which are in possession of the seller and can be, or articles which are, before the breach, set aside for the ex-

ecutory vendee so title can actually or constructively vest in him. Where that is not the case but the contract is for articles to be manufactured in the ordinary course of producing goods for the trade and there is a notification before anything shall have been done to pass title, then the choice of options mentioned does not exist. That is, a party to an executory contract for the sale of personal property may, of right so to speak, commit the wrong of breaching it and become liable for damages actually suffered. *Ward v. American H. F. Co.* 119 Wis. 12, 96 N. W. 388; *Malueg v. Hatten L. Co.* 140 Wis. 381, 122 N. W. 1057; *Lincoln v. Charles Alshuler Mfg. Co.* 142 Wis. 475, 125 N. W. 908. In such a case—where the contract does not relate to specific articles which can be treated as the property of the executory vendee before or at the time of the breach—he has but the one remedy to recover the difference between the contract price and the fair market value at the time and place for delivery (*Lincoln v. Charles Alshuler Mfg. Co.* 142 Wis. 475, 481, 125 N. W. 908), in case of such difference indicating a loss. If it does not so indicate, because of such fair market value being at least equal to the contract price he has no remedy because of not suffering any damage, as illustrated in *Potter v. Necedah L. Co.* 105 Wis. 25, 35, 80 N. W. 88, 81 N. W. 118.

It makes very little, if any, difference in this case whether appellant was entitled to make a choice of remedies because the action was brought for damages for breach of contract and the measure thereof is the excess of the contract price, if any, over the fair market value at the agreed time and place of delivery. As the court below found, there was no such excess, there was no damage to appellant, at most, only a technical wrong. It follows, necessarily, that the judgment is right if the findings are supported by the evidence. The rule governing the matter is conceded to have been rightly applied. The bone of contention is as to the time of the breach. That fixed the rights of the parties.

We cannot agree with counsel that the findings which, in effect, fix the time of the breach at not later than July 19, 1911, are wholly without evidence. That is grounded upon the theory that an express refusal to accept the property was required and that none occurred until in December, 1911. No such refusal was necessary. Neglect to attend at the time set by appellant under the contract, to wit, July 19, 1911, for delivery, under such circumstances as to plainly indicate a determination not to accept, was just as effective as an express refusal of a tender then made would have been. Moreover, before the time for the tender, appellant was notified by respondents, in the most unequivocal terms, that they would not accept the property until having first inspected the same in Chicago, and found, thereby, that it was in proper condition. That fixed the rights of the parties. Appellant evidently so understood it, as he did not thereafter tender the property at the place required by the contract.

It follows that the findings of the trial court as to the time of the breach cannot be disturbed; that the agreed time for delivery as set by appellant under the contract was July 19, 1911, and the contract place for delivery was Ridgeway station. That being the case, the fair value at such time and place was the material point to be determined. We are unable to find evidence that it was less than the contract price. Let it be conceded that there was no market value prevailing at the particular time and place except with reference to a sale for shipment and resale in Chicago or some other distant point. That does not make the market value at such distant point the material thing. The fair value at the proper time and place for delivery would be still the material thing and the market value at such distant point but an evidentiary circumstance. The real question is, What was the reasonable value for sale at the particular time and place? That called for the best evidence the nature of the case was susceptible of. The market value at such time and place, in case of there being

any, was the best evidence, but if there was none then the market value at advantageous points for dealing in such property, in connection with necessary expenses in reaching such markets, would be proper evidence.

In any view of the case which we can take, it seems that the finding as to the fair market value of the property at the time and place for delivery, the breach having taken place at that time at least, is well supported. If the market value at Chicago at that time were important, it would support the conclusion as to the value at the vital time and place. The circumstance of a sale some five months later to which respondents were not made parties by notice and which was not characterized by essentials to give it evidentiary value, really proved nothing, unless it did that the property was not of the kind originally contracted for or had been kept under such conditions that it had deteriorated in value approaching fifty per cent.

By the Court.—Judgment affirmed.

McGOWAN, Appellant, vs. PAUL and others, Respondents.

February 5—February 24, 1914.

Costs: Equity: Discretion: Review: Towns: Setting aside void contracts: Costs against town but not against town officers: Taxation of costs: Fees for serving papers.

1. In an equitable action the allowance of costs, being a matter in the discretion of the trial court, will not be disturbed upon appeal unless there was an abuse of that discretion.
2. Where, in an equitable action by a taxpayer, contracts which had been entered into by town officers acting on behalf of the town in good faith and in accordance with the wishes of a great majority of the electors were held void because not within the power of the town, there was no abuse of discretion in awarding costs to the plaintiff against the town and not against the town officers.
3. A motion to review the taxation of costs which does not, as re-

quired by Circuit Court Rule XXXII, point out in what respect the moving party was aggrieved, is insufficient.

4. Items in plaintiff's bill of costs for fees for service of summons, injunctional order, etc., although supported by affidavit of his attorney that such disbursements had been or would necessarily be made or incurred, were properly disallowed in taxing the costs, where the record showed and the court found that such service was not made by an officer.

APPEAL from a judgment of the circuit court for Rock county: GEORGE GRIMM, Circuit Judge. *Affirmed.*

This action was brought by a taxpayer on behalf of himself and other taxpayers to set aside contracts entered into by the officers of the defendant town of *Milton* for building cement sidewalks and lighting streets. The case was here before (141 Wis. 388, 123 N. W. 253) and the contracts held void. This appeal is from a judgment entered upon the mandate of this court on the former appeal.

The cause was submitted for the appellant on the brief of *J. J. Cunningham,* and for the respondents except *Crossman, Doran,* and *Hayes* upon the brief of *Jeffris, Mouat, Oestreich & Avery.*

KERWIN, J. The contentions here are (a) that the court below erred in adjudging costs against the defendant town of *Milton;* (b) in not adjudging costs against the defendants *John Paul, Henry Yale, E. D. Vincent, H. E. Schrader, L. A. Richardson, William Doran, B. P. Crossman,* and *Harry Hayes;* (c) that the court erred in disallowing certain items of costs incurred by plaintiff.

The mandate of this court on the former appeal ordered the judgment reversed and cause remanded with directions to render judgment declaring the contracts void and the levy of taxes and collection of the same for the purpose contemplated by such contracts illegal, and enjoining the town officers from issuing orders upon the treasurer for payment of any money upon such contracts, and enjoining the disbursement upon

such contracts of any money in the treasury. Judgment was entered by the court below in accordance with the mandate, with costs in favor of the plaintiff and against the defendant town of *Milton,* and that no costs should be allowed or taxed against the other defendants named.

The contention of counsel for appellant under this head is that the court erred in rendering judgment against the defendant town, and that judgment should have been rendered against the other defendants, especially the town officers, on the ground that, the contracts being void and without authority of law, the officers had no power to make such contracts, therefore the costs should go against such officers, not against the town. Counsel relies upon *State ex rel. Gordon v. McNay,* 90 Wis. 104, 62 N. W. 917, in which case the distinction is drawn between a case where the supervisors act on behalf of the town and a case where they act simply as governmental officers charged with the execution of a police power; and it was held that in the latter case the town cannot be held liable for their acts.

In the case at bar, however, the officers were acting on behalf of the town, although acting without authority. Nevertheless it is perfectly clear from the record that they acted in perfect good faith, believing they had authority to act, and not only that, but they were supported in their action by the great majority of the electors of the town. And it may further be observed in this connection that, while the plaintiff's action purports to be on behalf of himself and other taxpayers, it appears from the findings and the record, not only here but on the former appeal (141 Wis. 388, 123 N. W. 253), that the taxpayers generally supported the action of the town officers and were opposed to the action of the individual plaintiff in bringing the suit.

It is further insisted by appellant that the defendant town of *Milton* should not have been made a party to the action and was not in fact made a party, and that no service of the

summons and complaint was made upon the defendant town, and that the appearance of the town was voluntary and a gratuitous act of the town officers or of counsel for the town officers. But the record shows that the town was in fact a party, answered, and took part in the defense of the action in connection with the town officers. Moreover, as before observed, the electors of the town, or at least a large majority of them, favored and supported the defense on the part of the town and the town officers and were opposed to the action of the individual plaintiff.

This action being in equity under our statutes, costs may be allowed in whole or in part, in the discretion of the court. Sec. 2918. And, independent of statute, the rule is that in equitable actions the allowance of costs is largely within the discretion of the court, and that such discretion will not be disturbed in the absence of abuse. 11 Cyc. 32; *Menz v. Beebe,* 102 Wis. 342, 77 N. W. 913, 78 N. W. 601. As before observed, in this case the officers acted in good faith and in accordance with the wishes of a majority of the electors of the town, hence there was no abuse of discretion in not awarding costs against them. *Williams v. Williams,* 117 Wis. 125, 94 N. W. 25; *Carrier v. Atwood,* 63 Wis. 301, 24 N. W. 82; *O'Connor v. Walsh,* 83 App. Div. 179, 82 N. Y. Supp. 499; *Scrafford v. Gladwin Co.* 42 Mich. 464, 4 N. W. 167; *Zimmerman v. Miller,* 237 Pa. St. 616, 85 Atl. 871.

We think it clear from the record that the court below did not abuse its discretion in awarding costs against the defendant town, therefore such discretion cannot be disturbed.

The appellant also claims that error was committed in disallowing certain items of costs for service of injunction, injunctional order, and summons, copies, and travel, which service, it appears from the record, was not made by an officer. Counsel for appellant seems to argue this point on the theory that the service was made by an officer, but the record shows and the court found to the contrary.

The clerk disallowed the following items:

Fees service of summons and injunctional order.....	$4 50
Copies summons, 16 fols. at 10c.....	1 60
Copies amended complaint, 144 fols. at 10c.....	14 40
Travel, 24 miles at 10c.....	2 40

The bill of costs had attached an affidavit of the attorney for plaintiff "that the disbursements above mentioned have been or will necessarily be made or incurred, as he is informed and believes, and the copies charged for therein were actually or necessarily used or necessarily obtained for use in said action."

To the taxation of the items above referred to the following objection was made by defendant:

"None of the papers for which said disbursements have been made were served by an officer; that the person serving the same was not entitled to tax therefor; that no proof is on file or made as to the actual amount expended by said plaintiff for the service of said papers, and for the reason that said items are not properly taxable or allowable as disbursements herein."

A motion was made to review the taxation of costs, but it does not appear from the record whether the notice complied with Rule XXXII of the Circuit Court Rules or not, or whether the notice was sufficient to bring before the court the items for review. Where the motion to review fails to point out in what respect the plaintiff was aggrieved by the action of the clerk as required by Circuit Court Rule XXXII, the motion is insufficient. *Turner v. Scheiber,* 89 Wis. 1, 61 N. W. 280. The court on the review reversed the ruling of the clerk disallowing the following items in the bill of costs: "For draft injunctional order and copies, and draft affidavit and copies, draft bond for injunctional order and copies, in the sum of $11.59," and ordered that such sum of $11.59 be allowed and added to the amount of the judgment for costs; and further ordered that the finding of the clerk disallowing items of disbursements in plaintiff's bill of costs for "service

summons and injunctional order and copies, and for service of amended complaint and for travel," be sustained. There is no proof in the record sufficient to warrant the allowance of the items disallowed, so far as appears from the bill of exceptions. Counsel for appellant relies upon an affidavit of plaintiff's attorney, heretofore referred to, but this affidavit is not sufficient to overcome the finding of the court on review of taxation of costs upon the record before us. We are therefore of opinion that the judgment of the court on review of taxation of costs cannot be disturbed. We think the judgment below is right and should be affirmed.

By the Court.—The judgment is affirmed.

CITY OF MAYVILLE, Respondent, vs. METHODIST EPISCOPAL CHURCH OF MAYVILLE and others, Appellants.

February 5—February 24, 1914.

Plats: Construction: Church as "public building:" Extent and character of use of property donated.

1. In the construction of a plat, acts of the donor and acquiescence of the donee long continued are indicative of the donor's intent.
2. A lot designated upon a plat recorded in 1849 as "reserved for public buildings" was, seven years later, conveyed by the owners to a church society and the deed placed on record. Afterwards a church building was erected thereon and was occupied and used for church purposes for more than fifty years, during which time there were several conveyances by one church society to another, with confirmatory proceedings in court, and apparent acquiescence of the public in such occupancy and claim of title. *Held*, that a church, though not now considered a public building, has a *quasi*-public character; that the words of reservation must be construed to include a church; and that the grantee and its successors acquired the same interest in the lot as would inure to the owner or proprietor of a public building.

3. Such interest in the lot or use thereof cannot be limited to the bare maintenance of a place of worship thereon, but must include all such adjuncts or accessories as are usual, necessary, and convenient in connection therewith, such as cloak rooms, school or recitation halls or buildings, and a pastoral residence or parsonage.

APPEAL from a judgment of the circuit court for Dodge county: MARTIN L. LUECK, Circuit Judge. *Reversed.*

This was a suit in equity brought by the city to compel the defendant corporation to remove its church from and to restrain the defendants from constructing a pastoral residence adjacent to its church on the south half of a certain lot or tract of land designated in a plat as "reserved for public buildings." The defendant claimed title in fee by grant and by adverse possession to the lot or tract in question. Judgment was given for the plaintiff for the relief demanded, except that it was found that the defendant was entitled by estoppel of the plaintiff to the reasonable use of its church thereon and of all that part of said tract lying south of a point therein ten feet north of the north line of the present church building thereon, so much being reasonably necessary for the use and enjoyment of said church building.

On October 11, 1849, a plat was, by the owners of the land platted, filed in the office of the register of deeds of Dodge county, and this plat was certified as required by law and recorded on the date last mentioned. At that time the land in question lay within the boundaries of the organized town of Williamstown in Dodge county, and the village of Mayville, which included within its boundaries the platted land, first came into existence as a municipal corporation by force of ch. 313, Laws of 1867, and became a city by ch. 130, Laws of 1885. It has since adopted the general charter law. The plat mentioned was made and recorded by several owners of contiguous lands, some of whom owned as tenants in common the particular tract which included the lot or tract in question, while others owned contiguous lands included in the

plat, but had no title to that portion of the platted land in controversy. On May 12, 1856, those parties to the plat who held the title to the land in question conveyed by quitclaim deed to the trustees of the First Baptist Church of Mayville "the south half of lot denominated in plat as 'reserved for public buildings,' same lying west of and adjoining public square in said village." This deed was recorded on March 3, 1857, in the office of the register of deeds in volume 8 of Deeds on page 494, and thereafter, and apparently in consequence of some destruction of this record, a copy was recorded in the same office on September 9, 1890, in volume 102 on page 403. On March 25, 1876, recorded April 19, 1876, this south half was conveyed by warranty deed by the trustees of the First Baptist Church of Mayville to the trustees of the Methodist Episcopal Church of Horicon and Iron Ridge to be used for church purposes as long as needed. This conveyance recites that it was made under an order of the circuit court, but no such order was found. The deed contains what are therein called conditions, to the effect that the grantee shall not use the property for purposes not sanctioned by the orthodox, shall not sell the property so long as it is needed for religious puprposes, but when not so needed shall have the right to sell and pay over the proceeds to the First Baptist Church and Society of the village of Mayville. On October 4, 1892, recorded May 11, 1898, in the office of the register of deeds, Miscellaneous Records, volume 15, p. 426, is a decree of the circuit court for Dodge county adjudging that the title of the trustees of the Methodist Episcopal Church of Horicon and Iron Ridge, received by them by virtue of a deed dated March 25, 1876, which was authorized by an order of the circuit court, is fully confirmed in the Methodist Episcopal Church of Horicon and Iron Ridge, but also ordering that the First Presbyterian Society of Mayville shall have privilege to use said property for the purpose of worship in connection with their church society at any time

when the said Methodist Episcopal Church was not using the same, the Presbyterian Society to pay half the expenses of maintaining the church, including lighting, warming, janitor, and repairs. On January 11, 1897, recorded August 17, 1898, the trustees of the First Baptist Church of Mayville conveyed the south half in question to the trustees of the Methodist Episcopal Church of Horicon and Mayville. On July 10, 1899, recorded August 28, 1899, the trustees of the Methodist Episcopal Church of Horicon and Mayville conveyed by quitclaim deed to the trustees of the *Methodist Episcopal Church of Mayville* in trust for the use and benefit of the ministry and membership of the Methodist Episcopal Church in the United States subject to the discipline, usage, and ministerial appointment of said church as from time to time authorized and declared, and, if sold, proceeds to be disposed of and used in accordance with the provisions of said discipline. On October 5, 1899, the Trinity Methodist Episcopal Church of Mayville executed a mortgage to the Board of Church Extension of Methodist Episcopal Church, a Pennsylvania corporation, to secure a bond for $250. On November 20, 1899, recorded December 6, 1899, the trustees of the Trinity Methodist Church of Mayville executed a mortgage thereon for $250 to the Board of Church Extension of the Methodist Episcopal Church of Philadelphia, Pennsylvania. On May 24, 1875, a suit was begun by one S. W. Lamoreux as a taxpayer in behalf of himself and other taxpayers against the village of Mayville to enjoin that village from expending public money on an engine house on said tract, for the reason that the village never had any title to said tract. The remainder of the record of this suit is lost, and what became of the action we do not know. In 1892 findings and judgment were made in a suit by the First Baptist Church and Society of the village of Mayville against the Methodist Episcopal Church and its trustees. These findings declared that the defendant went into possession by virtue of a deed from the trustees of

the Baptist Church and Society of Mayville dated March 25, 1876, duly recorded and made under the authority of an order of the circuit court; that the plaintiffs in that action at the time of making said conveyance were the owners of said property and had full power and authority to deed and convey the same to the defendants, and that the defendants went into possession under that deed and remained in possession and were entitled to a decree confirming their title to said property to the defendant. Such a decree was entered October 4, 1892.

During this period of about fifty-four years the church building, repaired from time to time, was constantly maintained on the south half of the lot in question, but not always at the same place on said south half. The building was moved farther to the south and to the place where it now stands in 1899. The necessary excavations were made and the old excavation filled up and leveled off. An addition to the church was built and extensive improvements made at a large expense to defendant. There were other improvements made in 1907. The evidence with reference to acts of dominion by the church people is slight except as to the actual maintenance of the church building. There was some evidence of planting trees and also of hitching horses and such use as is ordinarily made of that part of a church lot not covered by the church building. This church building was owned by different religious denominations who succeeded one another in chain of title and was used at the same time by two as above stated, and it was also during a considerable portion of the time used for public gatherings and addresses. Carl Schurz lectured there as early as 1860. The certificates to the plat throw no light on the question. The plat itself is an ordinary plat consisting of named streets, numbered blocks and lots, and borders on the west side of the Rock river. Most of the streets converge on what is marked on the plat as "public square." East of this and separated from it by a

continuous line is part of a block not laid off into lots and marked with the word "reserved." West of this public square and inclosed within the apparent boundary lines of block 28 and separated from the public square by a distinct boundary line is the tract in question, designated "reserved for public buildings."

For the appellants there was a brief by *Naber & Wheeler*, and oral argument by *Emil Naber*.

Paul O. Husting, for the respondent, contended, *inter alia*, that a dedication legally made is irrevocable. *Redwood Cem. Asso. v. Bandy*, 93 Ind. 246; *Hunter v. Sandy Hill*, 6 Hill (N. Y.) 407; *Macon v. Franklin*, 12 Ga. 239; 15 Cent. Dig. tit. Dedication, § 1, col. 2765. The dedicator and his grantees are estopped to deny or revoke the dedication. *Bates v. Beloit*, 103 Wis. 90, 78 N. W. 1102; *Weisbrod v. C. & N. W. R. Co.* 21 Wis. 602; *Gardiner v. Tisdale*, 2 Wis. 153; *Cincinnati v. White's Lessee*, 6 Pet. 431; *Getchell v. Benedict*, 57 Iowa, 121, 10 N. W. 321; 15 Cent. Dig. tit. Dedication, § 77, col. 2922; *Warren v. Jacksonville*, 15 Ill. 236; *Buntin v. Danville*, 93 Va. 200, 24 S. E. 830; *Methodist E. Church v. Hoboken*, 33 N. J. Law, 13, 97 Am. Dec. 696; *Thorndike v. Milwaukee A. Co.* 143 Wis. 1, 126 N. W. 881; *Still v. Lansingburgh*, 16 Barb. 107; *Williams v. Smith*, 22 Wis. 594. A church is not a public building. *Collum v. State*, 109 Ga. 531, 35 S. E. 121; 32 Cyc. 752 and note.

TIMLIN, J. It is quite probable that a church would not be considered a public building within the present popular acceptation of the words. How the words "public buildings" were used and understood sixty-five years ago with reference to churches generally or by the makers of that plat is not so clear. The words "public square," together with the omission of boundary lines, clearly indicate a dedication to the public, but the words "reserved for public buildings" are not so clear of meaning. They could be understood to mean

that the owners reserved this tract in question inclosed by lines to themselves to be by them conveyed only as a site for public buildings, although that is not the ordinary meaning. So a church could have been considered a public building because of its *quasi*-public character, although that is not now the ordinary meaning of the word. As bearing upon the interpretation of this plat we must consider that the owners of the land, seven years after making the plat and fifty-five years before this suit commenced, undertook to convey the south half of the tract to the trustees of the First Baptist Church of Mayville and made that deed a public record at the time. We must consider the different conveyances following this and based upon it made and recorded during these fifty-five years, the several proceedings in court above noted, and the apparent acquiescence of the public for such length of time in the claim to and occupation of the lot in question by the defendant and its grantors. Such length of time and such acts and acquiescence are potent in the law to work even greater changes than a particular construction of a somewhat ambiguous written instrument. *Tempus enim modus tollendi obligationes et actiones.* Peloubet's Legal Maxims, citing Fleta, 4, 5, 12.

We must hold that such construction was placed upon the plat in question that the defendant acquired the same interest in and to the south half of the lot or tract, designated as reserved for public buildings, as if it and its predecessors in title were in occupancy thereof holding such title as would inure to the owner or proprietor of a public building; that under the circumstances and under the construction so given to the plat and grants mentioned a church is a public building in this instance, although not now generally so considered. Acts of the donor and acquiescence of the donee long continued are indicative of the intention of the donor with reference to a plat. *Pott v. School Directors,* 42 Pa. St. 132. The same is true of a deed. *Janesville C. Mills v. Ford,* 82

Wis. 416, 430, 52 N. W. 764, and cases cited; *Livingston v. Ten Broeck,* 16 Johns. 14, 8 Am. Dec. 297. A church was thought to be a public building in *Comm. ex rel. Att'y Gen. v. Beaver Borough,* 171 Pa. St. 542, 33 Atl. 112, and church purposes public in *Hannibal v. Draper,* 15 Mo. 634.

In view of the *quasi*-public character of churches generally and in consideration of the facts in this case as recited in the statement of facts, including the long acquiescence of the public in the use of this lot for such purposes, such use cannot be strictly limited to the bare maintenance of a place of worship thereon. A public building site must include all such adjuncts or accessories as are usual, necessary, and convenient in connection with the use of the property for public purposes. This would, in case of a church, ordinarily include cloak rooms, school or recitation halls and buildings, and a majority of this court, not however including the writer, consider that it would include a pastoral residence or parsonage.

It follows that the judgment appealed from should be reversed, and the cause remanded with directions to dismiss the complaint.

By the Court.—It is so ordered.

TOEPFER, Respondent, vs. STERR and others, Appellants.

February 5—February 24, 1914.

Appeal: Harmless errors: Evidence: Refreshing memory: Entire contracts: Substantial performance: Special verdict: Matters omitted: Presumption on appeal: Election between remedies.

1. Errors which might have tended to reduce a party's recovery if the jury had found in his favor must be deemed harmless where, under the verdict as found, he was not entitled to any damages.
2. A witness should not be allowed to refresh his memory by using a writing made by another person, unless he knows it to be correct.

3. In an action upon a contract for labor and material of the value of more than $9,000, it is *held* that the evidence (upon which the jury found that the reasonable cost of remedying the defects in the work would be $100) would fully warrant a finding of substantial performance.
4. Where, in such case, no question as to substantial performance was submitted to the jury and no such submission was requested, a finding of the court that there was such performance will be presumed in support of the judgment.
5. Where, in an action upon a contract for labor and materials, defendants counterclaimed for damages by reason of breaches by plaintiff, and the case was tried on that issue, this constituted an election between remedies, precluding defendants from afterwards insisting that the plaintiff was entitled to nothing because the contract was entire and had not been substantially performed.

APPEAL from a judgment of the circuit court for Dodge county: MARTIN L. LUECK, Circuit Judge. *Affirmed.*

The plaintiff contracted to furnish and put in place for the defendants certain machinery and equipment for a malting plant, the alleged reasonable value of which material and labor was $9,283.76. It was averred in the complaint that plaintiff had performed and that there was paid on account all of this sum except $597.89, for which judgment was asked. Among other articles furnished were four "steep tanks" and a "set of cold-air blinds for the kiln furnace." The defendants alleged by way of answer that the plaintiff guaranteed to furnish certain "steep tanks" of 800 bushels capacity, whereas the ones furnished had a capacity of only 750 bushels. It was further set forth in the answer that plaintiff agreed to furnish a complete new set of cold-air blinds for the kiln furnace, whereas the set furnished was of old material. The damages for these alleged breaches were placed at $2,000. The same facts were set up by way of counterclaim.

The jury found (1) that the steep tanks furnished had a capacity for steeping 800 bushels; (2) that the cold-air blinds furnished were not such as the contract called for; and

(3) that the reasonable cost of remedying the defects therein was $100. From a judgment entered in accordance with the verdict defendants appeal.

For the appellants the cause was submitted on the brief of *Naber & Wheeler* and *J. E. Malone.*

Louis G. Bohmrich, for the respondent.

BARNES, J. The errors assigned are (1) erroneous rulings on evidence; (2) failure to instruct the jury as requested; (3) giving erroneous instructions; (4) refusal to change the answer of the first question from "Yes" to "No;" (5) failure to grant a new trial; (6) compelling defendants to elect as to which of two measures of damages claimed on account of the steeping tanks they would rely on.

The evidence warranted the jury in finding that the steep tanks furnished had 800 bushels capacity. This conclusion eliminates most of the errors assigned, because they relate to rulings on evidence bearing on the amount of damages claimed to have been sustained by defendants because the tanks were not of the agreed capacity, and to instructions given and refused upon the same subject. Under the verdict the defendants were not entitled to any damages, and they could not have been harmed because of errors which might have tended to reduce their recovery had the jury answered the first question in the verdict differently.

Bearing on the capacity of the steep tanks, *Albert Sterr* was asked: "Looking at book Exhibit 6, can you look and refresh your memory how many bushels you malted a day?" Objection was sustained to this question, and properly so, because the book was not kept by the witness and there was nothing to show that he had any knowledge that it was correctly kept. The question did not ask for a computation. It was simply sought to get the witness to testify to a fact in reference to which he had only such knowledge as he might derive from the examination of a book which he did not keep.

Certain evidence given by the witness Nagel was stricken out, as we understand the record, because he also based his evidence on the contents of an account book which he did not keep. These rulings were correct. A witness should not be allowed to use a writing to refresh his memory which was made by another person unless he knows it to be correct. Jones, Ev. (2d ed.) § 877 (880) and cases cited in note 55.

It is argued that the contract was entire, and, the jury having found that the cold-air blinds furnished did not conform to the contract, no recovery could be had. The jury found that the reasonable cost of remedying the defect would be $100. Assuming the contract to be entire, the evidence would fully warrant a finding of substantial performance under the decisions of this court in *Foeller v. Heintz,* 137 Wis. 169, 118 N. W. 543; *Manning v. School Dist.* 124 Wis. 84, 102 N. W. 356; *Manthey v. Stock,* 133 Wis. 107, 113 N. W. 443; and *Mueller v. Burton,* 139 Wis. 384, 121 N. W. 152, 176. No question was submitted to the jury on the question of substantial performance and none was asked for; so we must presume a finding of the court that there was such performance, in support of the judgment, if such a finding is necessary or material. Sec. 2858*m,* Stats. 1913. Furthermore, the defendants counterclaimed for the damages which they sustained by reason of plaintiff's default and the case was tried on this issue. The defendants made their election of remedies and should be held to their election.

By the Court.—Judgment affirmed.

WESTRA, Respondent, vs. ROBERTS and another, Appellants.

February 5—February 24, 1914.

Vendor and purchaser of land: False representations as to quantity of plow land: Evidence: Special verdict: Instructions to jury: Damages.

1. A finding by the jury to the effect that plaintiff could not by the exercise of ordinary observation have known, when he purchased a farm of 120 acres, that there were but sixty-six acres under plow, instead of eighty acres as represented by defendants, is *held* to be sustained by evidence showing, among other things, that plaintiff and defendants spent several hours walking over the farm, but that a marsh divided it into two parts with cultivated land on each side, and that plaintiff, a Hollander, had less familiarity than the average man with our unit of land measure.
2. Such representation as to the quantity of land under plow related to a fact materially affecting the value of the farm, and it having been made under such circumstances that plaintiff was justified in relying thereon, and he having purchased the farm in reliance thereon and thereby suffered damage, he is entitled to recover.
3. Where questions were submitted in answer to which the jury found that for the purpose of inducing plaintiff to purchase a farm defendants made false representations as to the quantity of land under plow, that he believed such representations and relied upon them in making the purchase, and that he did not know their falsity and could not by ordinary observation have known thereof, there was no error in refusing to submit other questions as to whether plaintiff exercised "due diligence as an ordinary prudent man would to ascertain whether the representations were true or not," and whether he had "ample opportunity to ascertain whether the representations were true or untrue before the closing of the sale."
4. In the question "Did the plaintiff, when he purchased said farm, actually know how many acres were under plow?" and in an instruction relative thereto, the trial court did not by the use of the word "actually" require the jury to find that plaintiff knew the *exact* quantity of plowable land before they could answer the question in the affirmative.
5. The instructions in this case relative to the question of damages are *held* clearly to have limited the jury to the damage sustained by reason of the false representations as to the number of acres under plow, and none other.

APPEAL from a judgment of the circuit court for Dodge county: MARTIN L. LUECK, Circuit Judge. *Affirmed.*

Action to recover damages sustained in the purchase of a farm by reason of false and fraudulent representations claimed to have been made by the defendants as to the quantity of plowable land contained therein. It appears from the testimony that the defendants had an option on the farm in question, which contained 120 acres. On the 29th day of March, 1911, the plaintiff, in company with the defendants and one Alderden, who acted as interpreter for the plaintiff, examined the farm for several hours, and while such examination was being made the plaintiff, through his interpreter, asked how many acres there were under the plow, to which question, he claims, *Charles Roberts,* one of the defendants, answered, eighty acres. The defendants denied making the representation that there were eighty acres of arable land. Plaintiff bought the farm on the evening of the day he examined it, and had never been on it prior thereto.

The issues presented by the evidence were submitted to a jury, which found: (1) that defendants represented to plaintiff that there were eighty acres of the farm in question under plow; (2) that such representation was made for the purpose of inducing the plaintiff to purchase the farm; (3) that plaintiff believed such representation to be true; (4) that plaintiff in purchasing the farm relied upon such representation as true; (5) that such representation was untrue; (6) that plaintiff did not actually know how many acres were under plow; (7) that by the exercise of ordinary observation he could not have known when he purchased the farm the actual number of acres that were under plow; and (8) that he sustained damages in the sum of $550. From a judgment in favor of the plaintiff entered upon the verdict the defendants appealed.

For the appellants there was a brief by *Royal F. Clark* and *J. E. Malone,* attorneys, and *W. S. Stroud,* of counsel, and oral argument by *Mr. Clark* and *Mr. Stroud.*

For the respondent there was a brief by *North & Crowns,* attorneys, and *Burke & Lueck,* of counsel, and oral argument by *H. A. Crowns* and *R. W. Lueck.*

VINJE, J. The defendants' claim upon the merits is that, since plaintiff viewed the land and had an opportunity to examine it and determine for himself how many acres there were under the plow, representations made relative thereto by the defendants could not be made the basis of an action for damages, but would come within the rule that representations as to a fact easily ascertainable by the purchaser by the exercise of ordinary vigilance are not actionable. The jury found against them upon the proposition that plaintiff could by the exercise of ordinary observation ascertain the number of acres of arable land. Does the evidence sustain such a finding? Plaintiff and defendants spent several hours in walking over the 120 acres and examining them. The evidence as to the location and shape of the arable land is very meager and unsatisfactory. It appears, however, that a marsh divided the land into two pieces, and that there was cultivated land on both sides of it. Defendants represented there were eighty acres under the plow. The evidence showed there were only about sixty-six, or about fourteen acres less than represented. If the arable land had been in one piece of a rectangular shape, say 80 or 160 rods long, it might well be said, perhaps, that a person could by ordinary observation discover a shortage of fourteen acres. But when the plowable land consists of two or more pieces of presumably irregular shapes, it cannot be said that a finding of a jury that a shortage of fourteen acres could not have been discovered by plaintiff by ordinary observation is not supported by the evidence. The jury's finding is further supported by the fact that plaintiff was a native of Holland who had lived in Indiana four years, then gone back to Holland and remained for twelve years, and had again recently come

from that country. It is fair to assume that his ability to ascertain the area of land in acres was not equal to that of an average man of his age, on account of his lesser familiarity with our unit of land measure.

The representations made clearly related to facts which materially affected the value of the farm. And the unequivocal statement as to the number of acres under plow was well calculated to set at rest plaintiff's desire to ascertain that fact. When false representations as to material facts are made under such circumstances that the purchaser is justified in relying thereon, and he does so and sustains damage, the cause of action is complete. *Davis v. Nuzum,* 72 Wis. 439, 40 N. W. 497; *Castenholz v. Heller,* 82 Wis. 30, 51 N. W. 432; *Porter v. Beattie,* 88 Wis. 22, 26, 59 N. W. 499—as to true boundary lines or quantity; *Tyner v. Cotter,* 67 Wis. 482, 30 N. W. 782—as to title to real estate; *Miller v. Hackbarth,* 126 Wis. 50, 105 N. W. 311—as to title to personal property; *Woteshek v. Neuman,* 151 Wis. 365, 138 N. W. 1000—as to amount of taxes due on certain city lots.

Error is alleged because the court refused to include in the special verdict the following questions submitted by the defendants:

"(1) Did the plaintiff exercise due diligence as an ordinary prudent man would to ascertain whether the representations were true or not?

"(2) Did the plaintiff have ample opportunity to ascertain whether the representations were true or untrue before the closing of the sale?"

They claim that the answers to these questions would have determined the fact as to whether or not the plaintiff had a right to rely upon the representations made to him as to the quantity of arable land. The jury found that false representations as to quantity of land under plow were made to him by the defendants for the purpose of inducing him to purchase, that he believed them and relied upon them, that

he did not know their falsity and by ordinary observation could not have known thereof. These findings necessarily include the finding of the fact that he had a right to rely upon the representations made to him, and it was not error, therefore, to refuse the questions submitted by the defendants.

Exception is also taken to the use of the word "actually" in the question "Did the plaintiff, when he purchased said farm, actually know how many acres were under plow?" and also to the use of the word in the instruction relative thereto, where the court said: "By your answer to this question you are to determine whether the plaintiff, when he purchased the farm in question, actually had in mind the number of acres of land that were under plow." It is urged that under this question and the instructions relative thereto the court required the jury to find that plaintiff knew the *exact* quantity of plowable land before they could answer the question in the affirmative. We do not think the jury so understood the question or the instruction. The real issue made by the evidence was whether plaintiff was in fact misled to his disadvantage by the representations made as to the amount of land under plow. In other words, whether he knew, or by the exercise of ordinary observation could have known, that there were not as many acres under the plow as defendants said there were.

The claim that under the question relating to damages the jury were allowed to pass not only on the representations as to the number of acres, but as to all representations made by the defendants during the negotiations for the sale of the farm, is clearly not supported by the record. In the instructions relative to this question the jury was clearly limited to the damage sustained by reason of the false representations as to the number of acres under plow, and none other. The court said:

"You will determine the fair market value of the farm as it actually was when the sale was made and then determine

what the fair market value of the farm would have been had the farm contained the number of acres under plow represented by the defendants; then subtract the one sum from the other and the difference will be your answer to this question."

It is clear that under this instruction the jury were strictly limited to the difference in market value between the farm as it was and as it would have been had it contained the number of acres under plow as represented by the defendants, and that the jury was not permitted to, and did not, take into consideration any statement as to the character of the soil, or the expression of any opinion relative to the value of the farm which may have been made by the defendants during the negotiations leading up to the sale thereof. Since the correct measure of damages was submitted to the jury under proper instructions limiting them to representations made as to the quantity of arable land, and since there is ample competent evidence, within the rule laid down by the court, to sustain the damages found, other alleged errors as to the reception of evidence claimed to bear upon the question of damages, but not within the rule stated by the court, become nonprejudicial and immaterial.

By the Court.—Judgment affirmed.

TOBIN, Respondent, vs. NICHOLS and another, Appellants.

February 5—February 24, 1914.

Trial: Special verdict: Refusal to submit, when error: Evidence: Offers of settlement.

1. Under sec. 2858, Stats. 1913, making a special verdict, when duly demanded, a matter of right, it is error to refuse to submit a special verdict in a case in which, upon the evidence, there are several material, controverted issues of fact.
2. Offers of settlement made before or after suit are not admissible in evidence against the party making them.

Tobin v. Nichols, 156 Wis. 235.

APPEAL from a judgment of the circuit court for Dodge county: MARTIN L. LUECK, Circuit Judge. *Reversed.*

Plaintiff, who owns twenty acres of marsh land, sued the defendants for the destruction of the hay and grass thereon, resulting from a fire which was started by the defendants on the adjoining land and which afterwards escaped to plaintiff's land. The answer was a general denial; but on the trial the defendants admitted the kindling of a fire on the adjoining land August 31, 1911, and admitted that it was allowed to escape to the plaintiff's land, but claimed by their evidence that they whipped the fire out before it had burned more than an acre or two of stubble and dead vegetation. They also claimed that a second and independent fire took place four or five days later which burned over a large part of plaintiff's land, and that this second fire caused all the substantial damage for which the plaintiff sued, if in fact there was any substantial damage. The plaintiff claimed that there was but one fire, or, in other words, that the so-called second fire was only a continuation of the first. The defendants in due time asked for a special verdict, but the request was refused on the ground that the only question in the case was as to the amount of the damages.

Evidence was introduced by the plaintiff against objection and exception that plaintiff met defendant *Snowden* some days after the fire and before the action, and that *Snowden* then said that he would rather give something than have any trouble over the matter, and, after some discussion as to the value of the marsh hay burned, offered to pay the plaintiff, "just to avoid all further trouble," the sum of $24 in full settlement. Evidence as to a conversation with *Snowden* after the action was commenced, in which *Snowden* offered to buy the plaintiff's land at $450 "and call the lawsuit off," was also received against objection and exception.

The jury returned a general verdict for the plaintiff by

direction of the court and assessed the damages at $100, and the defendants appeal from judgment on the verdict.

For the appellants there was a brief by *Burke & Lueck,* and oral argument by *R. W. Lueck.*

For the respondent the cause was submitted on the brief of *J. E. & J. F. Malone.*

WINSLOW, C. J. In this case the following propositions are decided:

1. Under the statute making a special verdict a matter of right (sec. 2858, Stats. 1913), and the rule that "every material, issuable fact controverted on the evidence" should be covered by an appropriate question (*Schliesleder v. Milwaukee E. R. & L. Co.* 147 Wis. 668, 134 N. W. 144), it was error to refuse to submit a special verdict in the present case, because the evidence made it clear that the issues really raised by the pleadings and litigated on the trial were (1) whether there were two independent fires, for the second of which the defendants were not responsible; (2) if not, what was the total damage; (3) if so, what was the damage caused by the first fire.

2. Offers of settlement made before or after suit are not admissible in evidence against the party making them, because the settlement of controversies is favored in the law, and if the fact of an offer of settlement could be placed in evidence as an admission of liability there would be few who would venture to attempt a settlement. *Taylor v. Tigerton L. Co.* 134 Wis. 24, 114 N. W. 122.

3. These errors must be regarded as affecting the substantial rights of the appellants, and hence as entitling them to a new trial.

By the Court.—Judgment reversed, and action remanded for a new trial.

IN RE REESEVILLE DRAINAGE DISTRICT: LUECK, Appellant.

February 5—February 24, 1914.

Costs: Drainage proceedings: Statutes construed.

1. No costs are recoverable in any judicial proceeding except as clearly authorized by statute.
2. Statutes commonly give costs to the prevailing party against his adversary, and plain language would be required to provide for a recovery for the benefit of losing parties or their creditors.
3. In sec. 11, ch. 419, Laws of 1905 (sec. 1379—21, Stats. 1911),—providing that when a drainage petition or proceeding is dismissed as provided in secs. 4, 7, or 27 of said chapter "a judgment shall be entered against the petitioners and in favor of the commissioners for the costs, expenses and liabilities incurred in said proceedings, but for the benefit of those who have rendered services or advanced money in the prosecution of said proceedings, or have recovered costs on successful contests therein,"—the reference to sec. 4 (sec. 1379—14) was obviously a mistake, since in case of a dismissal under that section there would be no commissioners in whose favor judgment could be entered.
4. In construing the statute the court cannot go so far as to read into it the word "contestants," so as to make it provide for a judgment in favor of such contestants for the costs, expenses, and liabilities mentioned in case of a dismissal under said sec. 4.
5. The fact that the legislature subsequently (by ch. 633, Laws of 1913) amended the statute so as to provide for "a judgment in favor of the contestants or commissioners," does not indicate that the word "contestants" was previously left out by mistake.
6. Whether sec. 1379—21, Stats., deals with costs and expenses of any persons other than those who have successfully prosecuted or defended as petitioners, commissioners, or contestants, is doubted.

APPEAL from an order of the circuit court for Dodge county: CHESTER A. FOWLER, Judge. *Affirmed.*

Proceedings by the attorney for petitioners under the drainage law, after the dismissal of their petition for insufficiency with taxable costs against them in favor of remon-

strants, to have the reasonable value of his services and that of others and all liabilities incurred and expenditures made in their behalf in the proceedings, determined, and for judgment in favor of remonstrants against them for the benefit of the several claimants, the amounts to be apportioned between such petitioners according to acreage of land they respectively represented. In due course the proceedings were dismissed.

For the appellant there were briefs by *R. W. Lueck, in sua propria persona,* and *Otto Kuenzli,* of counsel, and oral argument by *Mr. Kuenzli.*

For the respondents there was a brief by *Kading & Kading,* and oral argument by *C. A. Kading.*

MARSHALL, J. Counsel for appellant does not complain of the order dismissing the drainage proceedings. Therefore respondents' suggestion as to nonappealability of said order, and immunity of it from attack in the circuit court, will be passed as inconsequential.

Are the costs and expenses of the petitioners, and debts contracted by them in prosecuting the proceedings for establishment of the drainage district, recoverable by way of enforcing the order of dismissal? That is the question to be decided. Its solution turns on the statute. No costs are recoverable in any judicial proceeding except as clearly thus authorized.

In deciding the suggested question there is little or no use of referring to statutes or decisions of other states and we shall, therefore, pass all citations in that respect without further notice.

Counsel cite authorities, mostly foreign, on the general subject of statutory construction. We must pass such citations, because the rules governing the matter are elementary and have been too often stated and applied in this court to leave any good reason for going elsewhere for light on the subject. Moreover it is useless to attempt construction until ambiguity shall have been discovered in the written law

which calls for construction. A statute cannot, properly, be read otherwise than literally merely to effect a particular object—as if it were within the office of construction to put meaning into a legislative enactment by that process. The office of construction is to discover the meaning which the lawgivers placed in the statute to be construed. True, where to give effect to a law in its letter would lead to some absurd or very unreasonable result, ambiguity exists, for it is presumed the legislature did not intend to make a law of that character, and, so, in such a case it is proper to apply well known rules for construction to give to such a statute such meaning as to avoid any absurdity or unreasonable character, if thereby a meaning can be gathered from such enactment which will do so and seemingly effect the legislative purpose. But that does not apply here, since there could hardly be anything suggested more absurd than a requirement that the costs and expenses of the losing parties in a judicial proceeding may be adjudged therein in favor of their adversaries for their benefit and that of those to whom they are indebted. That is out of harmony with the whole theory of recoverable costs. Statutes commonly give costs to the prevailing party against his adversary, or make some equitable provision therefor. Therefore it requires courage to claim that the drainage statute contemplates something radically different and to maintain it by judicial construction.

Enough has been said to indicate that, unless sec. 1379—21 (see sec. 11, ch. 419, Laws of 1905) of the drainage law as it existed when the proceedings in question occurred, clearly supports appellant's claim, the order complained of is right. It provided for recovery of "costs, expenses, and liabilities incurred in said proceedings, but for the benefit of those who have rendered services or advanced money in the prosecution of said proceedings, or have recovered costs on successful contests" in case of the petition or proceedings being dismissed as provided in secs. 4, 7, or 27. The first sec-

tion is now sec. 1379—14, Stats., the next is now sec. 1379—19 and sec. 1379—20, and the last is included in sec. 1379—31*f*. That the reference to sec. 4 was a mistake is obvious because only a judgment in favor of the commissioners was provided for and a dismissal under such section would be in advance of there being any commissioners. Counsel for appellant, appreciating that, invokes construction to avoid it; but how can the court read into sec. 4 the word "remonstrants" so as to give vitality thereto on the subject under discussion, unless it be clear that the legislature intended it to be there?

It is the office of judicial construction to get out of an enactment what the legislature put into it, in terms or effect, viewing words as if in their proper order and omitted words in place which are there by necessary or reasonably clear implication. Construction can go a great way, but there is a limit. It is reached before judicially making law, though it may, and often does, go to the extent of getting sense out of a law where none could be discovered by reading it just as enacted. That is well illustrated in *Neacy v. Supervisors of Milwaukee Co.* 144 Wis. 210, 128 N. W. 1063.

The fact that the legislature, by ch. 633, Laws of 1913, amended sec. 1379—21, Stats., so as to provide for "a judgment in favor of the contestants" as well as "commissioners," harmonizing it with sec. 1379—14, does not indicate that the legislature of 1905, by mistake left such word out of sec. 4 of the drainage law in 1905, any more than it does that the legislature of 1913 made the mistake of adding such word without dropping out the provision from the latter in respect to costs in favor of the petitioners. Provision having been made, originally, for such costs in case of a dismissal in advance of there being commissioners, it was useless to refer to the subject in what is now sec. 1379—21. It seems much more likely that the first legislature made the mistake of referring, in said sec. 11, to sec. 4 and did not intend to make

provision for costs in favor of the contestants in the latter and again in the former, than that it intentionally omitted to use the word "contestants" as well as the word "commissioners." Sec. 4 (sec. 1379—14, Stats.), in case of the contestants prevailing in advance of commissioners being appointed, covers the subject, according to the ordinary way of allowing costs to a prevailing party,—covers it the same as in sec. 1379—20, Stats. (sec. 7 of the law of 1905). It is notable that while the last legislature sought to make some sensible reference in sec. 1379—21 to sec. 1379—14 by interpolating the word "contestants" in each of two places after the word "commissioners," it dropped out the former reference to sec. 7, now sec. 1379—20, thus creating worse confusion than before. Secs. 1379—14 and 1379—20 are in harmony, read by themselves, and always were, but by the late change intended to cure confusion in the act of 1905, a different provision is found as to costs in the one from that in the other, under the same circumstances, to wit, when the contestants are the prevailing parties.

In the situation mentioned we cannot see any warrant for reading sec. 1379—14, as it formerly existed, as if it contained the word "contestants" following the word "commissioners."

If we could surmount the difficulty indicated and read sec. 1379—14 as desired, there would still be difficulty. It is by no means clear that sec. 1379—21 deals with costs and expenses except of such persons as have successfully prosecuted or defended as petitioners, commissioners, or contestants. As said before, ordinarily, only costs of prevailing parties are contemplated in judicial proceedings and against adverse parties. Any different recovery, as for instance that of costs incurred by or in behalf of the moving parties for the benefit of their creditors, would be such an out of the current matter that plain language would be required to provide for it.

No more need be said. We cannot find warrant in the

statute for sustaining appellant's position. We cannot engraft anything onto the drainage law on the subject of costs by reading the same in connection with the provision for costs in actions and special proceedings. Such subject having been specially covered in the law, it is exclusive except as the ordinary fee-bill costs is inferentially referred to in sec. 1379—14. The term "at the cost of the petitioner" doubtless means such costs as are taxable in favor of a prevailing party according to the general policy of the written law as found in the provisions with reference to costs in actions and special proceedings.

By the Court.—The order is affirmed.

PARADIES, by guardian *ad litem*, Respondent, vs. WOODARD, by guardian *ad litem*, Appellant.

February 5—February 24, 1914.

Infants: Liability for torts: Negligence: Riding bicycle in school yard: Injury to another: Pleading: Contributory negligence.

1. Infants are liable for their tortious acts.
2. A complaint alleging in substance that defendant, a boy between thirteen and fourteen years old, drove and rode a bicycle upon which another boy was riding with him, thus making it more difficult to manage and more dangerous, in the playgrounds of a public school where such riding was expressly forbidden, at such a speed, without warning, and with such want of ordinary care that he knocked down, ran over, and injured the plaintiff, is *held*, on demurrer, to state a cause of action.
3. A complaint need not negative contributory negligence on the part of the plaintiff, that being defensive matter.

APPEAL from an order of the circuit court for Dodge county: MARTIN L. LUECK, Circuit Judge. *Affirmed.*

This action was brought against the defendant William Woodard and his son, *John Woodard*, a boy between thir-

teen and fourteen years of age. Each defendant demurred separately. The demurrer of the defendant William Woodard was sustained and the complaint dismissed as to him. The demurrer of *John Woodard* was overruled, and from the order overruling the said demurrer this appeal was taken.

James F. Trottman, guardian *ad litem,* for the appellant.

For the respondent the cause was submitted on the brief of *Rubin & Zabel,* attorneys, and *Horace B. Walmsley,* of counsel.

KERWIN, J. The only question involved upon this appeal is whether the complaint states a cause of action against the defendant *John Woodard.* The chief contention of counsel for appellant is that the allegations of negligence are not sufficiently specific to constitute a cause of action. It will therefore be necessary to examine briefly the allegations of the complaint in so far as they purport to state negligence on the part of the minor defendant, *John Woodard.*

The complaint alleges in substance that *John Woodard* is the son of William Woodard, and is between thirteen and fourteen years of age, and resides with his father; that on May 6, 1912, defendant William Woodard authorized and permitted his said son to use a bicycle and run the same at all times as his said son saw fit; that on said May 6, 1912, while using and managing said bicycle, said *John Woodard* drove the same in the playgrounds of the public school in Watertown, Wisconsin, where the plaintiff then was with other children attending the school, and so drove and rode said bicycle carelessly, negligently, and with such want of ordinary care as to cause, permit, and allow said bicycle in rapid motion to strike, knock down, and run over the plaintiff so that the plaintiff thereby suffered injuries, that is to say, plaintiff's right leg was broken in several places and his right leg was maimed, mangled, and bruised and other parts of his body injured.

The complaint further alleges that ordinary care required,

and it was the duty of the defendant, at the time and place in question, not to run or ride said bicycle on the playgrounds of the school house where plaintiff was injured, such use being expressly forbidden by the teachers of the school, under whose control the grounds were at the time in question; that it was the duty of the defendants in the exercise of ordinary care, if said bicycle was run at all upon said grounds, to run it at a slow speed with a vigilant outlook maintained, and if run or ridden at all on said grounds at the time in question, not to be ridden by more than one person, and to give warning to all persons in the path of said bicycle; that at the time of the injury another boy was riding with defendant *John Woodard,* and the said defendant failed to perform the duties hereinbefore mentioned and at the time and place in question so negligently ran said bicycle as to cause the injuries to the plaintiff, and that said instances of want of care and failure to perform the duties specified on the part of the defendants were the proximate cause of the injuries sustained.

Counsel for appellant contends that the mere riding of a bicycle on the playgrounds in rapid motion is not negligence nor unlawful use of the bicycle, and that negligence will not be inferred in such case if an accident result, and that there is no averment in the complaint as to whether there were many other children or persons on the playground; and further, that it is not unlawful or negligence for two boys to ride upon the same bicycle at the same time, and that the complaint is silent as to what plaintiff was doing when the bicycle struck him. The mere riding of a bicycle alone might be innocent sport, but riding it negligently with such force and violence as to carelessly and negligently run into another and injure him as plaintiff was injured here may constitute actionable negligence. What the plaintiff was doing when struck is immaterial if he was not guilty of contributory negligence, and contributory negligence is defensive matter. *Harper v. Holcomb,* 146 Wis. 183, 130 N. W. 1128. It is not

necessary that the complaint negative contributory negligence. The specific allegations of the complaint, taken in connection with the general allegations of negligence on the part of the defendant *John Woodard,* are sufficient on demurrer under the decisions of this court. *Hanson v. Anderson,* 90 Wis. 195, 62 N. W. 1055; *Fitts v. Waldeck,* 51 Wis. 567, 8 N. W. 363; *Young v. Lynch,* 66 Wis. 514, 29 N. W. 224; *Doolittle v. Laycock,* 103 Wis. 334, 79 N. W. 408.

It is also said that it is not negligence for two boys to ride upon the same bicycle at the same time. The allegations of the complaint, however, show that in the instant case the bicycle was more difficult to manage and control when being ridden by two persons, and that the collision under such circumstances was rendered more dangerous and destructive.

The complaint should be liberally construed on demurrer. *Darlington v. J. L. Gates L. Co.* 142 Wis. 198, 125 N. W. 456; *Hall v. Bell,* 143 Wis. 296, 127 N. W. 967. The case of *Hanson v. Anderson, supra,* is quite analogous to the instant case. The allegations there were to the effect that defendant drove his team at a great speed along the highway, and came up behind the plaintiff's vehicle and negligently ran into it. The allegations were held sufficient on motion to make the complaint more definite and certain.

It is well settled that infants are liable for their tortious acts. Citation of authority on this point is unnecessary.

The learned counsel for appellant cites us to several Wisconsin cases, and discusses them at length in his brief, which he contends sustain his position that the complaint fails to state a cause of action. We have examined these cases carefully and think they do not support counsel's contention. We shall not prolong this opinion by a discussion of them. We think the allegations of the complaint, admitted on demurrer, state a cause of action against the defendant *John Woodard,* therefore the order overruling the demurrer must be affirmed.

By the Court.—The order appealed from is affirmed.

LISKO, Respondent, vs. RETZLAFF, Appellant.

February 5—February 24, 1914.

Slander: Complaint: Innuendo: Demurrer.

Upon demurrer to a complaint for slander it is sufficient that the words alleged to have been spoken are in popular usage fairly capable of expressing and conveying to others the slanderous meaning attributed to them by the innuendo, the sense in which they were intended and in which they were understood by the hearers being a question of fact for the jury.

APPEAL from an order of the circuit court for Dodge county: MARTIN L. LUECK, Circuit Judge. *Affirmed.*

The appeal is from an order overruling a demurrer to the complaint.

August Kading, for the appellant.

For the respondent there was a brief by *Husting & Brother,* and oral argument by *Paul O. Husting.*

TIMLIN, J. The complaint avers that in the year 1881 a brother of the plaintiff, in the presence of the plaintiff and another, was shot and seriously wounded, causing death, all of which occurred without fault or agency of the plaintiff. That on October 11, 1911, the defendant, becoming involved in a dispute with the plaintiff and being then angry and abusive, spoke of and concerning the plaintiff in the German language false and defamatory words set forth in German and translated as meaning, "You are such a fellow you shoot your own brother." This is followed by innuendo averring that the speaker thereby intended to charge the plaintiff with the crime of assaulting and shooting his said brother with a dangerous weapon. A further averment charges in the same way that the defendant on November 14, 1911, spoke of and concerning the plaintiff false and defamatory words in German, which being translated were: "He is a hothead. I

charged him with having formerly shot his brother with a revolver and that was enough; for *Martin* [the plaintiff] then ran away." This was followed by similar innuendo, and it was also averred that the persons in whose presence and hearing the German words were spoken understood the language. The utterances on November 14th were also set forth as a second cause of action.

Under the liberal rules of pleading prevailing in this state the demurrer was properly overruled. In what sense the defendant intended the spoken words and in what sense they were understood by the hearers is a question of fact for the jury, for the words, while insufficient as an indictment, are nevertheless in popular usage fairly capable of expressing and conveying to others the meaning attributed to them by the innuendo.

By the Court.—Order affirmed.

LANDRY, Respondent, vs. WEBSTER MANUFACTURING COMPANY, Appellant.

February 5—February 24, 1914.

Negligence: Injury to switchman: Obstruction on private track: Contributory negligence: Questions for jury: Instructions.

1. The questions whether a manufacturing company was negligent in leaving a movable bridge or runway of planks across a switch track in its yard, and whether the foreman of a switching crew who was injured by coming in contact therewith while he was riding at night upon the footboard of a switch engine was guilty of contributory negligence, are *held*, upon the evidence, to have been for the jury.
2. The charge in this case is *held* to have properly stated the issues and correctly instructed the jury as to ordinary care, proximate cause, and contributory negligence.
3. A party desiring more particular instructions to the jury than are contained in the brief but correct charge of the court should present them.

APPEAL from a judgment of the superior court of Douglas county: CHARLES SMITH, Judge. *Affirmed.*

This is an action for personal injuries brought for an injury received by the plaintiff while riding on the front footboard of a switch engine owned and operated by the Great Northern Railway Company, which was running into the appellant's factory yard at Superior for the purpose of taking out two freight cars loaded with chairs. The plaintiff was the foreman of the switching crew. At about 1 o'clock in the morning on January 19, 1912, he received orders to proceed with the engine and crew to the appellant's yard and take out the two cars. This instruction was being carried out at the time of the accident. The night was dark, the thermometer below zero, snow on the ground, and frost in the air. The engine and crew reached the switch track leading into the appellant's yards at about 5 o'clock a. m. The plaintiff unlocked the gate with a key and resumed his place on the front footboard of the engine with Robinson, another member of the crew, who was standing on the right-hand side in order that the engineer might see his signals. The engine then proceeded into the yard at a speed of three to five miles an hour, when it ran into a movable bridge or runway consisting of three planks which had been placed across the tracks by the employees of the appellant for convenience in taking stock to or from the stock shed. This runway stands nineteen inches above the track, has been in use for many years by the appellant, and has to be removed whenever switching is done. Sometimes the removal is made by the switching crew and sometimes by the appellant's employees. It struck the respondent at the time in question and inflicted serious injuries. The appellant knew that switching was to be done in the yard that night. The evidence tended to show that neither plaintiff nor Robinson had been in this yard before, and that in the condition of the snow and frost it would be quite hard to see the runway during the night when approaching it on the engine. The Great Northern Railway Company

was originally joined as a defendant, but a nonsuit as to it was granted on the trial, and there is no appeal from that ruling. The case has already been here on demurrer to the complaint and will be found reported in 152 Wis. at page 379 (140 N. W. 75).

A general verdict for the plaintiff, with damages fixed at $3,000, was returned by the jury, and the defendant appeals from judgment thereon.

H. V. Gard, for the appellant.

W. P. Crawford, for the respondent.

WINSLOW, C. J. The appellant claims, *first,* that the evidence fails to show any negligence by defendant; *second,* that it shows conclusively contributory negligence on the part of the plaintiff; and *third,* that the court erred in not stating the issues to the jury and not instructing them adequately as to what acts would constitute ordinary care and what would constitute negligence. As to the first two propositions, we content ourselves with the remark that both questions were fairly questions for the jury upon the evidence as set forth in the statement of facts.

As to the third contention, we find that the trial judge said to the jury, "The jury understand the issue they are to pass upon. Under all the circumstances of the case was the defendant . . . guilty of want of ordinary care, and of such character that it was the proximate cause of the injury?" The trial judge then defined correctly ordinary care, proximate cause, and contributory negligence, and briefly but lucidly told the jury the legal results which would follow from their conclusions upon those questions of fact.

Had the defendant desired more particular instructions it should have presented them. A charge which briefly and correctly puts the case before the jury is entitled to commendation rather than criticism. Such a charge was given in this case.

By the Court.—Judgment affirmed.

DROVERS' DEPOSIT NATIONAL BANK, Respondent, vs. TICHENOR, imp., Appellant.

February 6—February 24, 1914.

Contracts: Validity: Statute of frauds: Promise to pay debt of another: "Guaranty:" Absolute promise: Consideration.

1. Where certain stockholders of a corporation, by an agreement in writing reciting their interest in the business of the corporation and their desire to assist it in obtaining credit and money, promised that if the plaintiff bank would discount certain promissory notes of one N. held by such corporation they would pay the same at maturity, such writing was not a mere collateral agreement to answer for the debt or default of another but an original promise by the signers to pay what became under the agreement their own debt.
2. Although such instrument was called therein a "guaranty," its nature is determined by its terms, which are those of an absolute and unconditional promise to pay.
3. The word "guaranty" is often used as a synonym for promise, and to denote an absolute agreement.
4. Such writing having been executed in Illinois and the notes being payable in London, England, if it should be construed as an agreement to answer for the debt or default of another it would be governed by the Illinois or English statute of frauds, neither of which requires that the consideration be expressed in the writing.
5. Both the statutes referred to require a consideration to support such a promise; but a consideration may consist of a benefit to the promisor or a detriment to the promisee, and the discounting of the notes by the promisee in reliance upon the promise was a sufficient consideration.
6. It is not intended to hold that, upon the facts as stated, the agreement, even if construed as a promise to answer for the debt of another, would not be valid under our statute of frauds.

APPEAL from an order of the circuit court for Waukesha county: MARTIN L. LUECK, Circuit Judge. *Affirmed.*

This is an appeal from an order overruling a demurrer to the amended complaint in the action. The complaint alleged that plaintiff was a national banking corporation doing business at Chicago, Illinois; that the Tichenor-Grand Company

was a corporation also doing business in the state of Illinois; that the defendants *Tichenor,* Grand, and Newgass were stockholders in said Tichenor-Grand Company, and that the defendant *Tichenor* was the president of such company; that on July 27, 1908, one Nicholson executed and delivered to the Tichenor-Grand Company five promissory notes, dated at London, July 27, 1908, and payable July 27, 1910; that in and by each of said notes said Nicholson promised and agreed to pay the Tichenor-Grand Company or order, at Parr's Bank, London, the sum of two thousand and fifty pounds sterling; that the sum agreed to be paid by said five promissory notes aggregated ten thousand two hundred and fifty pounds sterling, and that a copy of one of said notes is made a part of the complaint; that on the 30th day of September, 1909, the Tichenor-Grand Company was the owner of and holder of said five promissory notes, and that on said day the defendants entered into an agreement with the plaintiff, whereby the defendants promised and agreed, in consideration of the plaintiff purchasing and discounting said five promissory notes, that they would pay the said notes at maturity according to the tenor thereof, and that a true copy of said agreement is annexed to the complaint and marked Exhibit B; that in performance of said agreement, relying upon the same, and in consideration thereof, the plaintiff discounted to the Tichenor-Grand Company said five promissory notes, and paid said company the sum of $9,983.50 for each of said promissory notes, less the discount thereof, and that said Tichenor-Grand Company did then and there indorse and deliver over to said plaintiff the said five promissory notes; that plaintiff demanded payment of said notes at maturity, and that four of said notes were paid, but that Exhibit A remains unpaid; that defendants have been requested to pay the same and have neglected to do so; that plaintiff is the owner of said note, and there is now due and owing from

the defendants the sum of $9,983.50 with interest from July 27, 1910, no part of which has been paid.

The complaint then sets out the Illinois statute of frauds applicable to cases where one person agrees to answer for the debt, default, or miscarriage of another. Among other things the statute pleaded provides: "The consideration of any such promise or agreement need not be set forth or expressed in writing, but may be proved or disproved by parol or other legal evidence."

The complaint further sets forth the English statute of frauds, which contains a provision substantially similar to that of the Illinois statute above quoted.

Exhibit B attached to the complaint reads as follows:

"Chicago, Illinois, September 30, 1909.

"To the *Drovers' Deposit National Bank* of Chicago, Illinois:

"The undersigned being interested in the business success of the Tichenor-Grand Company, a corporation, and desire to assist it in obtaining credit with you and money from you, hereby request you to discount for the said Tichenor-Grand Company five (5) promissory notes of 2,050 pounds each made and executed by Alfred J. Nicholson dated at London, July 27, 1908, and payable July 27, 1910, aggregating in all the sum of 10,250 pounds sterling.

"We do hereby promise and agree to pay said notes at maturity, according to the tenor thereof, and we do hereby waive notice of the acceptance of this guaranty.

"M. H. TICHENOR.
"W. D. GRAND.
"LOUIS H. NEWGASS."

The demurrer was interposed on the ground that the complaint did not state a cause of action because the agreement between the defendants and the plaintiff was *nudum pactum*.

For the appellant there was a brief signed by *Edw. O'Bryan* and *Wm. N. Marshall*, attorneys, and *McGee, Jeger & Klingelhoefer* and *E. J. Henning* and *Michael M. Hoyt*, of counsel, and oral argument by *Mr. O'Bryan*. They con-

tended, *inter alia,* that under the English and Illinois statutes, as well as under that of Wisconsin, a sufficient consideration is required; and if the promise is made after the debt is incurred there must be a new and sufficient consideration. The agreement in question is clearly a guaranty of an existing debt of another person, and there must be something more than an incidental benefit or advantage resulting to the promisor to take the case out of the statute; citing many cases.

For the respondent there was a brief by *Newton W. Evans,* attorney, and *Miller, Mack & Fairchild,* of counsel, and oral argument by *J. G. Hardgrove.*

BARNES, J. The appellant contends that the agreement sued on is void because it was a promise to pay the debt of another and the writing does not express the consideration therefor and because there was no consideration in fact to support the promise.

The complaint alleges that defendants agreed, in consideration of the plaintiff purchasing the notes referred to in the statement of facts, that they would pay the same at maturity, and that in performance of said agreement and relying on the same and in consideration thereof plaintiff paid $9,983.50 to the Tichenor-Grand Company for the note involved in this suit. The demurrer admits these averments to be true. By Exhibit B the defendants agreed "to pay the notes at maturity according to the tenor thereof," because they were interested in the business of the corporation which owned the notes and desired to assist it in obtaining credit and money from the plaintiff.

As to the plaintiff, the transaction did not involve any preexisting obligation. Neither the maker of the note nor the payee nor the defendants owed the plaintiff anything when the agreement sued on was made. The complaint sets forth that the plaintiff, relying on the promise to pay made by the defendants, parted with $9,983.50. This is not a mere col-

lateral agreement to answer for the debt or default of another, but an original promise by the defendants to pay what became under their agreement their own debt. *Shook v. Vanmater,* 22 Wis. 532; *Vogel v. Melms,* 31 Wis. 306; *Young v. French,* 35 Wis. 111; *Weisel v. Spence,* 59 Wis. 301, 18 N. W. 165; *Green v. Hadfield,* 89 Wis. 138, 61 N. W. 310; *Champion v. Doty,* 31 Wis. 190; *Hall v. Wood,* 3 Pin. 308; *West v. O'Hara,* 55 Wis. 645, 13 N. W. 894; *McNaughton v. Conklings,* 9 Wis. 316. It will be noticed that the signers of Exhibit B called it a guaranty. The nature of the instrument should determine its character, rather than the name which the parties applied to it. The agreement in form is not to guarantee payment of the notes if the maker did not pay them, but the defendants say: "We do hereby promise and agree to pay said notes." There is no alternative provided for. While the word "guaranty" ordinarily means an undertaking to answer for the debt or the performance of a duty by another in case such other fails to pay or perform, colloquially it is frequently used in reference to an original undertaking. The cases recognize the fact that the word is often used as a synonym for "promise," and to denote an absolute agreement. *Esberg-Bachman L. T. Co. v. Heid,* 62 Fed. 962, 963; *Packer v. Benton,* 35 Conn. 343, 348; *Delsman v. Friedlander,* 40 Oreg. 33, 66 Pac. 297, 298; *Thayer v. Wild,* 107 Mass. 449, 452; *Gaster v. Ashley,* 1 Ark. 325, 333.

If the agreement should be construed as one wherein the signers undertook to answer for the debt of another, the complaint states a good cause of action. The contract was made in Illinois and the note was payable in London. It is alleged that while the English and Illinois statutes of frauds require such a promise to be in writing, they do not require that the consideration for the promise be expressed in the writing. In this they are unlike our statute (sec. 2307). There must, however, be a consideration in fact in order to support a

promise under the English and Illinois statutes. A consideration may consist of a benefit to the promisor or a detriment to the promisee. *Messenger v. Miller,* 2 Pin. 60; *Eycleshimer v. Van Antwerp,* 13 Wis. 546; *Hewett v. Currier,* 63 Wis. 386, 23 N. W. 884; *Dohr v. Wolfgang,* 151 Wis. 95, 97, 138 N. W. 75; *Gegare v. Fox River L. & L. Co.* 152 Wis. 548, 557, 140 N. W. 305. The complaint shows that plaintiff parted with nearly $50,000 of its money on the strength of the defendants' promise. This is a pretty substantial consideration. The appellant seems to think that the consideration must move from the promisor directly to the promisee and must be beneficial to the latter in order to satisfy the statute. This is no doubt due to a misapplication of a rule of law which has been established in a class of cases very different from the one we are considering. It has been held that where a promise is collateral and is not in writing, or the writing does not express the consideration, and where the promisee has already parted with his money or property, the promise is not within the statute if the promisee actually pays to the promisor a consideration beneficial to the latter for his undertaking. Manifestly this rule has nothing to do with the case before us.

Neither do we intend to intimate that the agreement, read in connection with the allegations of the complaint, is not valid under our statute of frauds. Aside from the interest which the defendants had in the corporation, it appears that the money was paid after the agreement was made and on the strength of it. See *Williams v. Ketchum,* 19 Wis. 231; *Young v. Brown,* 53 Wis. 333, 10 N. W. 394; *Eastman v. Bennett,* 6 Wis. 232; *Waldheim v. Miller,* 97 Wis. 300, 72 N. W. 869; *Coxe Bros. & Co. v. Milbrath,* 110 Wis. 499, 86 N. W. 174; *Miami Co. Nat. Bank v. Goldberg,* 133 Wis. 175, 113 N. W. 391; *Sentinel Co. v. Smith,* 143 Wis. 377, 127 N. W. 943.

By the Court.—Order affirmed.

DIANA SHOOTING CLUB, Appellant, vs. KOHL, Respondent.

February 6—February 24, 1914.

Trespass: Hunting and fishing: "Wild" land: Nominal damages: Costs: Appeal from justice's court.

1. In general, nominal damages suffice for the vindication of a legal title or right.
2. Although in this case nominal damages seem inadequate to vindicate plaintiff's right as against an intentional trespasser who shot ducks upon land leased and used by plaintiff for purposes of hunting and fishing and of breeding and preserving game and fish, yet, there having been no proof of other damage and the trial court not having exercised its discretion to set aside the verdict, this court does not feel authorized to interfere on the ground of such inadequacy.
3. "Wild" land, within the meaning of sec. 3575*m*, Stats. (relating to costs in actions for trespass by hunting or fishing on "wild and uninclosed lands"), is land in a state of nature, uninhabited, unoccupied, and uncultivated, and not in use by the owner, his agent or lessee, for any artificial purpose. Marsh land, however extensive, which is leased and used by a shooting club as a feeding and breeding place for wild fowl and for purposes of hunting and fishing, and which, though uninclosed, is surrounded by cultivated farms, is not "wild" land.
4. In an action in justice's court for trespass upon lands not within the purview of said sec. 3575*m*, Stats., it was error to limit the costs against the defendant to a sum equal to the damages awarded, which were nominal.
5. Where, in such case, upon appeal from the justice's judgment there was a new trial in the circuit court and plaintiff failed to obtain a more favorable judgment of damages, defendant was entitled to costs, under sec. 2925, Stats., and plaintiff cannot complain of a judgment in its favor for costs equal to the nominal damages recovered.

APPEAL from a judgment of the circuit court for Dodge county: MARTIN L. LUECK, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *Doe & Ballhorn,* and oral argument by *J. B. Doe.*

For the respondent there was a brief by *C. M. Davison,* attorney, and *Paul O. Husting,* of counsel, and oral argument by *Mr. Husting.*

TIMLIN, J. The plaintiff brought an action of trespass against the defendant in justice's court, where a jury awarded it six cents damages. The plaintiff appealed to the circuit court and another jury awarded the same amount of damages. Each of these courts considered itself controlled by sec. 3575*m*, Stats., which reads as follows:

"The taxable costs in any action brought by the owner of any wild and uninclosed lands against any person for trespass by hunting or fishing thereon, shall in no case exceed the damages awarded such owner for the actual injury caused by such trespass."

The plaintiff's first contention on appeal to this court is that the verdict should have been set aside by the circuit court because the damages are inadequate. It appeared from a lease in evidence that the plaintiff was lessee of said land, with the sole and exclusive right, license, permission, and authority to occupy, use, and enjoy the same for the purposes of hunting, fishing, trapping, breeding, and preserving game, fish, wild animals, and wild fowl, and was required to pay a rental of $1,200 per year therefor and authorized and permitted to maintain a dam at a designated point. No other evidence was offered by the plaintiff because of an admission in the answer that the defendant did hunt upon the land in question. The defendant in his own behalf testified that he was on the land a couple of hours and shot one or two ducks; that they were uninclosed lands and what he should call wild lands; that he went there for no other purpose, and when he started out he knew he was going onto the lands of the *Diana Shooting Club* for the purpose of hunting. This land was part of a very large marsh surrounded by well cultivated, fertile farms, but not cultivated or inclosed.

The learned circuit judge might no doubt, in his discretion, have set aside the verdict and granted a new trial. The amount of damages found seems to be inadequate to vindicate the right of the plaintiff as against an intentional trespasser. Had the plaintiff offered evidence showing that such tres-

pass and shooting frightened away wild fowl and had a tendency to injure the place as a breeding habitat or a rendezvous for feeding or for any other purpose having relation to the gregarious nature of the fowl or that of animals congregating there, we think the damages would have been obviously inadequate. But there was no other proof of damages made than that above mentioned, and we do not feel authorized under such circumstances in setting aside the verdict because of inadequate damages. Weight must be given to the exercise of his discretion by the court below, and it has been for a long time considered to be the law that nominal damages suffice for the vindication of a legal title or right.

Appellant next argues that the case is not within the cost statute above quoted. The land was uninclosed, but the statute quoted, in order to limit the plaintiff as above stated, requires that the land be both wild and uninclosed. Wild land is land in a state of nature, uninhabited, unoccupied, and uncultivated, and not in use by the owner, his agent or lessee, for any artificial purpose. We do not think the marsh property of a shooting club however extensive, used as a feeding and breeding place for wild fowl and for the purposes of hunting during the lawful hunting season and surrounded by cultivated farms, is wild land within the meaning of this statute. Such land is inhabited and occupied so far as the nature of the property will permit and the use to which it is put. At such seasons in which occupancy or habitation for the purpose of hunting is lawful this must be very obvious. It would be quite extreme to say that a piece of marsh land for which a rental of $1,200 per year is paid for the purpose of fishing and hunting, trapping, breeding, and preserving game, wild animals, and wild fowl thereon is wild land within the meaning of this statute. We should not construe this statute so as to discriminate against the plaintiff or other persons making a similar use of uninclosed marsh lands, such as cutting hay thereon during the season, nor so as to prevent plaintiff from effectually protecting its property rights, un-

less we are absolutely required by the words of the statute to do so. Then the statute would be of doubtful validity. *Durkee v. Janesville,* 28 Wis. 464. It is one thing to limit the costs in actions for trespass committed in hunting on wild lands, that is, lands unoccupied and uninhabited at all times and in a state of nature and not devoted to any particular use, and quite another to limit the costs for trespass by hunting on lands devoted by the owner or lessee to the breeding and hunting of wild fowl, while allowing costs to all other persons for trespasses affecting the use to which their property is devoted. The lands in question do not belong in the class of wild lands or lands in a state of nature, but are lands devoted to a particular purpose of the owner which is interrupted and specially injured by that kind of trespass here complained of. The costs added to nominal damages may suffice for the protection of plaintiff's property; nominal damages with only as much costs as damages would not. So the justice should have taxed full costs against the defendant. If the plaintiff had appealed from the justice's judgment merely on the record as there made and there was no new trial in the circuit court, plaintiff could have had the error of the justice corrected and could have collected the costs of both courts. But there was a new trial upon appeal, and in such case the plaintiff, not having obtained a more favorable judgment of damages than that from which it appealed, was not entitled to costs, but the defendant was so entitled. Sec. 2925, Stats. We therefore hold that the judgment of the justice and that of the circuit court were both erroneous in the matter of costs, but that the error has not prejudiced the appellant because its title is vindicated and it pays less costs than it would had the proper judgment been entered in circuit court.

By the Court.—Judgment affirmed.

BARNES, J., took no part.

DIANA SHOOTING CLUB. Appellant, vs. HUSTING, Respondent.

February 6—February 24, 1914.

Navigable waters: Rights of the public and of riparian owners: Hunting: Extent of right: High-water mark.

1. Navigable waters in this state are public waters, and the policy which, in the ordinance of 1787, in the enabling act of 1846, and in the state constitution, reserved to the people the full and free use of public waters should not be limited or curtailed by narrow construction but should be interpreted in the broad and beneficent spirit that gave rise to it.
2. Riparian owners on navigable streams in this state have only a qualified title to the beds of such streams, which title is entirely subordinated to, and not inconsistent with, the right of the state to secure and preserve to the people the full enjoyment of navigation and the rights incident thereto.
3. The right of the public to hunt on the navigable streams of this state is, like the right to fish in such streams, an incident of the right of navigation.
4. Hunting on navigable waters is lawful when it is confined strictly to such waters while they are in a navigable stage, and between the boundaries of ordinary high-water marks; and when so confined it is immaterial what the character of the stream or water is, whether deep or shallow, clear or covered with aquatic vegetation.
5. By ordinary high-water mark is meant the point on the bank or shore up to which the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristic.
6. Where the bank or shore at any particular place is of such a character that it is impossible or difficult to ascertain where the point of ordinary high-water mark is, recourse may be had to other places on the bank or shore of the same stream or lake to determine whether a given stage of water is above or below ordinary high-water mark.

[7. Whether the public has a right to hunt between ordinary high-water marks on a navigable stream which, owing to a low stage of water, is unnavigable, or on land between such marks which has become dry or exposed, not decided.]

APPEAL from a judgment of the circuit court for Dodge county: MARTIN L. LUECK, Circuit Judge. *Affirmed.*

Action of trespass. The complaint alleges the incorporation of the plaintiff; that on the 24th day of September, 1911, it was lawfully in possession of section 19 in the town of Williamstown, Dodge county, Wisconsin, and was the owner of the exclusive right and title to the hunting and shooting privileges upon said section. It then charges that the defendant unlawfully broke and entered upon the same, trod down and injured the grass, rushes, wild rice, and herbage growing thereon, and disturbed the plaintiff in the use and occupation of its land and interfered with its exclusive right to hunt and shoot thereon, to its damage in the sum of $50. The answer denied that the defendant broke or entered upon the premises of plaintiff or hunted upon its land or in any way disturbed its possession or right of enjoyment thereto, and alleged that defendant hunted only upon the public navigable waters of the state; that he was a resident thereof and in possession of a license duly issued which entitled him to hunt where he did.

The trial court found these facts: The defendant at the time of the alleged trespass was a resident and citizen of this state, in possession of a valid hunting license. On September 24, 1911, without trespassing upon the lands of the plaintiff, he entered his hunting boat floating upon the waters of Rock river and with the aid of pole and paddle propelled it down the river to the place of the alleged trespass, and there, for the purpose of shooting wild ducks flying over the place, he pushed it into a growth of vegetation known as "flag" which grew from the bottom of the water to a height of from four to five feet above the surface. The place of the alleged trespass was within the area of what is known as Malzahn's Bay, which is a widening of the river and is about one-half mile wide and about five eighths of a mile long. The bay has well defined shores or banks and is surrounded

on all sides, with the exception of the channels through which the water passes, with what are called hard bog, which may be traveled afoot without a person walking thereon sinking in. During the months of March to June, inclusive, in each year, at time of ordinary high water, the water over this entire area, from hard bog or shore, is from one to two feet in depth. During the summer months and fall this depth gradually decreases to from eight to twelve inches. In times of low water, for a distance of several rods out from the hard bog or shore, the water recedes from the surface altogether, leaving a rim of mud exposed. Such exposed rim, called soft or mud bog, at such times is unnavigable by boat and cannot be traveled upon by foot without a person so attempting to walk thereon sinking to his knees or hips. During the spring and summer months, up to and including the month of June, each year, the waters of Malzahn's Bay are, and have for thirty-five years at least been, navigable in fact from hard bog to hard bog over its entire area, and have during all such time in each year been navigated generally by the public with rowboats. During the period ending in June of each year the place of the alleged trespass is covered with water in common with the remaining area of Malzahn's Bay, and during all of the time within the last thirty-five years has been navigable and navigated the same as, and as a part of, said Malzahn's Bay, and during such period said place has not been distinguishable in appearance from any other part of the bay. After the month of June in each year, vegetation, consisting of wild rice, bulrushes, water lilies, and flag, take root below the surface of the water in the soft muck of the bottom and grow above the surface to a height of from four to five feet, forming blinds or cover in which hunters conceal themselves from view of the ducks flying over. The flag extended west and north from where the trespass is alleged to have occurred for a distance of about ten to twelve rods to what is known as the old river bed, which is between two to

three rods in width, and during the periods of each year ending in June is navigable in fact and has always been in fact navigated with the remaining area of Malzahn's Bay. Later in the year, in times of low water, the water recedes, sometimes leaving the bottom of the old river bed exposed and sometimes leaving it with a shallow covering of water. At such times the river bed is dotted with sparsely growing aquatic vegetation, such as rushes, rice, and flag. Up to and including the month of June each year the place of the alleged trespass is separated from the hard bog or shore by such strip of water. To the west and north of said old river bed again occurs a growth of flag and rushes which continues to the west and north of the hard bog or shore of the bay. At the time and place in question the water below the boat of the defendant was about twelve inches deep, and his boat was floating upon the water. The water to the west and north of his boat gradually decreased in depth as it neared the hard bog or shore, finally ending a number of rods from the hard bog or shore, leaving the bottom of the bay exposed. In all other directions the place of the alleged trespass was surrounded by open water free from vegetation to the line of vegetation upon the opposite shore of the bay, and all of said open water, including that part of the bay covered by aquatic vegetation until the so-called mud or soft bog was reached, was navigable in fact at all periods of the year, except when frozen over. At about the place in question the waters of the bay began to narrow down to what is known as Skirmish Line, which lies upon the usual route of travel from points north and east to points west and south, and the place of the alleged trespass was during the period ending in June of each year within the route of such travel. Rock river, including Malzahn's Bay, has been in fact, for more than thirty-five years prior to the 24th of September, 1911, a natural, navigable river and body of water and was in fact navigated by the public generally by skiffs and rowboats during all of said time.

At the time of the alleged trespass the plaintiff had a valid subsisting lease of certain land abutting on Rock river, and the bed of the river, including Malzahn's Bay at the point of the alleged trespass, was embraced within the descriptions of premises covered by said lease, which in its terms purported to give to the plaintiff exclusive hunting privileges upon the premises owned by the lessors and covered by the lease.

As conclusions of law the court found (1) that plaintiff at the time in question had no vested right to use the place of the alleged trespass to the exclusion of the public; (2) that the defendant was lawfully exercising the right to hunt at said place and did not trespass upon the lands of the plaintiff and did not in any manner interfere with plaintiff's rights; and (3) that judgment should be entered dismissing the complaint upon the merits.

From a judgment entered accordingly the plaintiff appealed.

For the appellant there was a brief by *Doe & Ballhorn,* and oral argument by *J. B. Doe.* They contended, *inter alia,* that the right of navigation or to use a river as a highway does not carry with it the right to conceal one's self in the vegetation belonging to and growing on the property of another, for the purpose of shooting wild ducks, and the doing so and actually shooting such ducks constitutes trespass upon the rights of the owner of the soil under the water and of the vegetation growing through and above such water. Defendant's right upon the navigable portions of Rock river consists of nothing more than a right to pass to and fro over the open waters of such portions of said river, and he had no right to leave the open part of the stream or to push into the vegetation belonging to and in the exclusive possession of the plaintiff, or to stop or hide on plaintiff's premises for the purpose of hunting or to shoot ducks passing over plaintiff's premises. The exclusive right to do such acts was vested in the plaintiff by its lease; that is, in the owner of the soil. They cited *Bristow v. Cormican,* L. R. 3 App. Cas. 641; Gould, Waters

(3d ed.) § 81; 2 Farnham, Waters & Water Rights, sec. 398; *State v. Roberts,* 59 N. H. 256; *Percy S. Club v. Astle,* 145 Fed. 60; *Duncan v. Sylvester,* 24 Me. 482; *Schulte v. Warren,* 218 Ill. 108, 75 N. E. 783; *Willow River Club v. Wade,* 100 Wis. 86, 76 N. W. 273; *Diana S. Club v. Lamoreux,* 114 Wis. 44, 89 N. W. 880; *Whittaker v. Stangvick,* 100 Minn. 386, 111 N. W. 295; *L. Realty Co. v. Johnson,* 92 Minn. 363, 100 N. W. 94, 66 L. R. A. 439; *Sterling v. Jackson,* 69 Mich. 488, 37 N. W. 845.

For the respondent there was a brief by *Husting & Brother,* and oral argument by *Paul O. Husting.* To the point that in this state the riparian owner of land abutting on a navigable stream takes and holds his title to the bed of such stream between the lines of ordinary high-water mark, in trust for and subject to the rights of the public for the purpose of navigation, hunting, fishing, and other like public purposes, they cited *Willow River Club v. Wade,* 100 Wis. 86, 76 N. W. 273; *Ne-pee-nauk Club v. Wilson,* 96 Wis. 290, 71 N. W. 661; *Priewe v. Wis. S. L. & I. Co.* 103 Wis. 537, 79 N. W. 780; *Pewaukee v. Savoy,* 103 Wis. 271, 79 N. W. 436; *Diana S. Club v. Lamoreux,* 114 Wis. 44, 54, 89 N. W. 880; *Ill. S. Co. v. Bilot,* 109 Wis. 418, 84 N. W. 855, 85 N. W. 402; *Franzini v. Layland,* 120 Wis. 72, 81, 97 N. W. 499; *In re Horicon D. Dist.* 136 Wis. 227, 234–237, 116 N. W. 12. As to how the high-water mark is to be determined, they cited *Carpenter v. Hennepin Co.* 56 Minn. 513, 58 N. W. 295; *Welch v. Browning,* 115 Iowa, 690, 87 N. W. 430; 15 Am. & Eng. Ency. of Law (2d ed.) 342; *Howard v. Ingersoll,* 13 How. 381, 427, 428.

VINJE, J. The ordinance of 1787 establishing the government of the Northwest territory of which Wisconsin formed a part, provided that "The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and for-

ever free, as well to the inhabitants of the said territory, as to the citizens of the United States, and those of any other states that may be admitted into the confederacy, without any tax, impost, or duty therefor." The act of April 20, 1836, establishing the territorial government of Wisconsin, provided in sec. 12 thereof that the inhabitants of the territory should be subject to all the conditions and restrictions and prohibitions contained in the ordinance of 1787. The act of August 6, 1846, enabling the people of Wisconsin territory to form a state, declared that "the said state of Wisconsin shall have concurrent jurisdiction on the Mississippi and all other rivers and waters bordering on the said state of Wisconsin, so far as the same shall form a common boundary to said state and any other state or states now or hereafter to be formed or bounded by the same; and said river and waters, and the navigable waters leading into the same, shall be common highways and forever free, as well to the inhabitants of said state as to all other citizens of the United States, without any tax, duty, impost or toll therefor." Sec. 1, art. IX, of our constitution provides that "the river Mississippi and the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the state as to the citizens of the United States, without any tax, impost or duty therefor."

It will thus be seen that ever since the organization of the Northwest territory in 1787 to the time of the adoption of our constitution the right to the free use of the navigable waters of the state has been jealously reserved not only to citizens of the territory and state but to all citizens of the United States alike. All that part of Rock river as far north as the northern boundary of Dodge county is by sec. 1607, Stats. 1913, declared navigable, and the court found it, as well as the *locus in quo,* to be so in fact, at the time the alleged trespass was committed. The case therefore presents the ques-

tion whether the right to hunt on navigable waters of the state is reserved to the residents thereof where the title to the land covered by such waters is in private parties. At common law the rights of hunting and of fishing were held to be incident to the right of navigation. In England, however, only waters on which the tide ebbed and flowed were held navigable. Such limitation upon navigable waters has never obtained in the United States. Navigability in fact for products of the forest, field, or commerce for regularly recurrent annual periods has, in our state, been held sufficient to constitute a stream navigable. *Olson v. Merrill,* 42 Wis. 203; *Weatherby v. Meiklejohn,* 56 Wis. 73, 76, 13 N. W. 697; *A. C. Conn Co. v. Little Suamico L. M. Co.* 74 Wis. 652, 655, 43 N. W. 660; *Falls Mfg. Co. v. Oconto River Imp. Co.* 87 Wis. 134, 58 N. W. 257; *Bloomer v. Bloomer,* 128 Wis. 297, 311, 107 N. W. 974.

In some of the states embraced within the Northwest territory the title to the bed of navigable streams remained in the state. In Wisconsin it is held to be in the riparian owners. So far as the right of navigation, and the rights incident thereto, are concerned, it is entirely immaterial who holds the title, the state or the riparian owners. Such title is equally subject to the rights mentioned. It is beyond the power of the state to alienate it freed from such rights. *Priewe v. Wis. S. L. & I. Co.* 103 Wis. 537, 550, 79 N. W. 780, and cases cited; *People v. New York & S. I. F. Co.* 68 N. Y. 71; 1 Farnham, Waters & Water Rights, sec. 36*a*. Speaking of this difference in the law of the several states as to who owns the title to the bed of navigable streams, the supreme court of the United States in *Hardin v. Jordan,* 140 U. S. 371, 383, 11 Sup. Ct. 808, 838, says:

"In the one case, the state, by its general law, does not allow the grant to inure to the individual farther than to the water's edge, reserving to itself the ownership and control of the river bed; in the other cases, the states allow the full common-law effect of the grant to inure to the grantee, reserving

to themselves only those rights of eminent domain over the waters and the land covered thereby which are inseparable from sovereignty."

It would no doubt have been more logical to hold, as English courts do, that private ownership ends where navigability begins, but there is nothing inconsistent in the doctrine of private ownership of beds of navigable streams subject to all the burdens of navigation and the incidents thereof. As long as the state secures to the people all the rights they would be entitled to if it owned the beds of navigable rivers, it fulfils the trust imposed upon it by the organic law which declares that all navigable waters shall be forever free. As was pointed out in *Willow River Club v. Wade,* 100 Wis. 86, 76 N. W. 273, riparian owners on navigable streams have only a qualified title to the beds thereof, which title is entirely subordinated to, and not inconsistent with, the rights of the state to secure and preserve to the people the full enjoyment of navigation and the rights incident thereto.

The same case also clearly establishes the right of the public to fish in all the navigable waters of the state, holding as it does that the right of navigation carries with it the right of fishing, which is incident to the right to navigate. The same process of reasoning applies to the right to hunt on navigable waters as an incident to the right of navigation. No difference in principle is perceived. Indeed, if there is any force at all in assuming that there is no relation between the title to the bed of a navigable stream and the fish in the waters above it, there would seem to be less relation between game and the title to such bed. However, neither the right to fish nor to hunt need be grounded on the absence or presence of such a relation. It is perfectly logical and consistent to extend to our navigable waters such rights as were by the common law of England extended to waters declared navigable by it, even though we enlarge the field of navigability. By sec. 13 of art. XIV of the constitution the common law

of the territory not inconsistent with the constitution was expressly declared to continue to be a part of the law of the state until changed or suspended by legislative enactment.

The extent of the right of a state to regulate and control navigable waters and the soil beneath them, and to declare what waters are navigable, has not been clearly defined. Speaking upon the subject, the supreme court of the United States, in *Hardin v. Jordan,* 140 U. S. 371, 382, 11 Sup. Ct. 808, 838, says:

"This right of the states to regulate and control the shores of tide waters, and the land under them, is the same as that which is exercised by the Crown in England. In this country the same rule has been extended to our great navigable lakes, which are treated as inland seas; and also, in some of the states, to navigable rivers, as the Mississippi, the Missouri, the Ohio, and, in Pennsylvania, to all the permanent rivers of the state; but it depends on the law of each state to what waters and to what extent this prerogative of the state over the lands under water shall be exercised."

Some states have held that the right of hunting on a navigable stream cannot be exercised by the public. *Winous Point S. Club v. Bodi,* 20 Ohio C. C. 637; *State v. Shannon,* 36 Ohio St. 423. Nor on the navigable waters of a bay, where the ownership of the soil is in private parties. *Sterling v. Jackson,* 69 Mich. 488, 37 N. W. 485—so decided by a divided court of three to two. But if title to the soil under navigable waters is in the state, the right of the public to hunt on such waters exists. *Ainsworth v. Munoskong H. & F. Club,* 153 Mich. 185, 116 N. W. 992, 17 L. R. A. N. S. 1236. And in Illinois it is held the right to hunt and fish is not incident to the right of navigation. *Schulte v. Warren,* 218 Ill. 108, 75 N. E. 783. In Maine and Massachusetts the right of the public to hunt and fish upon inland navigable waters of any size is recognized. *Conant v. Jordan,* 107 Me. 227, 77 Atl. 938, 31 L. R. A. N. S. 434. Our court has never been called upon to determine the right of the public to hunt

on navigable waters the title to the bed of which is in private parties. In *Ne-pee-nauk Club v. Wilson,* 96 Wis. 290, 71 N. W. 661, it was held that riparian owners on a meandered lake had no exclusive right to hunt thereon, and the court, *obiter,* said: "The right of fishing and fowling upon such waters is in the owner of the soil which is under the water," citing *Hardin v. Jordan,* 140 U. S. 371, 11 Sup. Ct. 808, 838, and *Bristow v. Cormican,* L. R. 3 App. Cas. 641. The first case does not really so hold, and the English case was based upon the doctrine that the Crown had no right to non-tidal waters, and that there was no right in the public to fish in such waters.

In *Merwin v. Houghton,* 146 Wis. 398, 131 N. W. 838, the public right of hunting and fishing upon the navigable waters of the state was recognized and asserted, though not the direct subject of adjudication. The question there considered was the right to improve the navigability of a navigable stream, and it was urged that it should not be done because it would take away the right of the public to hunt and fish in certain navigable channels and widenings of the stream which the proposed improvement would destroy. But it was held that the rights of hunting and of fishing must, within reasonable limits, yield to the paramount right to improve the navigation of the stream.

The wisdom of the policy which, in the organic laws of our state, steadfastly and carefully preserved to the people the full and free use of public waters, cannot be questioned. Nor should it be limited or curtailed by narrow constructions. It should be interpreted in the broad and beneficent spirit that gave rise to it in order that the people may fully enjoy the intended benefits. Navigable waters are public waters and as such they should inure to the benefit of the public. They should be free to all for commerce, for travel, for recreation, and also for hunting and fishing, which are now mainly certain forms of recreation. Only by so construing the provi-

sions of our organic laws can the people reap the full benefit of the grant secured to them therein. This grant was made to them before the state had any title to convey to private parties, and it became a trustee of the people charged with the faithful execution of the trust created for their benefit. Riparian owners, therefore, took title to lands under navigable waters with notice of such trust and subject to the burdens created by it. It was intended that navigable waters should be public navigable waters, and only by giving members of the public equal rights thereon so far as navigation and its incidents are concerned can they be said to be truly public.

Hunting on navigable waters is lawful when it is confined strictly to such waters while they are in a navigable stage, and between the boundaries of ordinary high-water marks. When so confined it is immaterial what the character of the stream or water is. It may be deep or shallow, clear or covered with aquatic vegetation. By ordinary high-water mark is meant the point on the bank or shore up to which the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristic. *Lawrence v. American W. P. Co.* 144 Wis. 556, 562, 128 N. W. 440. And where the bank or shore at any particular place is of such a character that it is impossible or difficult to ascertain where the point of ordinary high-water mark is, recourse may be had to other places on the bank or shore of the same stream or lake to determine whether a given stage of water is above or below ordinary high-water mark.

Whether the right exists in the public to hunt on a navigable stream, between ordinary high-water marks, which, owing to a low stage of water, is unnavigable, or on land between such marks which has become dry or exposed, is not involved in this case and is not decided.

No exceptions were taken by either side to the correctness

of the trial court's findings of fact. And since they found that defendant hunted only on and over the navigable waters of this state, it follows from what has been said that the proper judgment was entered.

By the Court.—Judgment affirmed.

BARNES, J., took no part.

TIMLIN, J. I concur in the result upon the grounds that there is no finding that the defendant did any shooting and that it is not found or shown that the trespass described in the findings was within the boundaries of plaintiff's land (*Ne-pee-nauk Club v. Wilson,* 96 Wis. 290, 71 N. W. 661), or whether it was upon a lake or river. Many lakes could be described as the mere widening of a river. If that would in law transform a lake into a river, the law would depend upon the mere accidental and irrelevant circumstance that what might otherwise be considered the inlet and outlet of the river are given the same name. I do not think the right or privilege to shoot wild fowl flying over a stream is incident to or connected with the right of navigation of a stream where the riparian proprietors own the river bed by qualified title subject to navigation. Especially is this true where the stream was not returned as meandered by the United States survey, but sold by conveyances which include the river, its bed and its banks. I do not think any case in this court heretofore decided can fairly be said to decide this point, although there are argumentative statements to be found which if given legislative force might be construed to cover it.

WILLE, Appellant, vs. MAAS and another, Respondents.

February 6—February 24, 1914.

Trespass: Boundaries: Adverse possession: Counterclaim.

1. Upon the uncontradicted evidence in an action of trespass involving the title to land, defendants are *held* to have acquired title by adverse possession to the strip in dispute.
2. In an action of trespass to determine the title to a strip of land and for damages, a counterclaim for trespass by plaintiff on the same land is connected with the subject of the action and hence properly pleadable.

APPEAL from a judgment of the circuit court for Dodge county: MARTIN L. LUECK, Circuit Judge. *Affirmed.*

This is an action arising out of a dispute over the location of a line fence dividing the property of the plaintiff on the north from that of the defendants *Maas* and *Fehrman* on the south. Prior to the 9th of December, 1908, a fence existed dividing the property of the plaintiff from that of the defendants. In the fall of 1908 plaintiff had a survey made and such survey located the dividing line to the south of the existing fence, the strip between the old fence and the newly established line being 79.53 feet at its greatest width and narrowing down until it met the old line at the west boundary of the *Fehrman* property and to a width of about forty-one feet at the east boundary of the *Maas* property. In December following plaintiff moved the old fence to the south to the line established by the surveyor as the proper dividing line between his property and that of the defendant *Maas,* and in May, 1909, moved that part of the old fence which separated his property from that of *Fehrman* to the line established by the surveyor. In October, 1909, the above named defendants, together with their codefendants, whom they employed to assist them, removed the old fence from where it had been placed by the plaintiff and carried the posts and wires back onto the lands of the plaintiff north of the line of the old

fence. Plaintiff began this action in justice's court, alleging trespass. The defendants set up the necessary facts to show that the title to land would come in question and gave the necessary bond and the case was certified to the county court of Dodge county. The defendants *Maas* and *Fehrman* then answered separately, setting up title by adverse possession to the respective portions of the strip of land in dispute adjoining the parcels of land which they owned and also counterclaimed for damages for trespass. The action was thereafter removed to the circuit court by reason of the filing of an affidavit of prejudice. At the close of the trial the court directed a verdict to the effect that the true boundary line between the property of the plaintiff and that of the defendants was along the north line of the strip in dispute and that the defendants had the right to take down and remove the fence to the place where it formerly stood. By its answers to questions submitted on a special verdict the jury awarded damages to the defendants, and in accordance therewith judgment was entered dismissing plaintiff's complaint and awarding damages to the defendants on their counterclaims. From such judgment plaintiff appeals.

For the appellant the cause was submitted on the brief of *J. E. & J. F. Malone.*

For the respondents there was a brief by *Husting & Brother,* and oral argument by *Paul O. Husting.*

BARNES, J. The errors assigned relate to rulings on evidence, to instructions given and refused, to the decision of the court holding that there was no jury issue on the question of title, and to the refusal of the court to sustain the demurrers interposed to the counterclaims of the defendants.

No substantial question is raised in regard to the rulings on evidence, and it would be unprofitable to discuss them in detail.

We think the uncontradicted evidence showed that the de-

fendant *Fehrman* had been in adverse possession of the portion of the disputed strip abutting on or part of the west half of the northwest quarter of section 9, township 9, range 16, for more than twenty years before the 1908 survey was made, and that the defendant *Maas* had adversely and for a like period occupied that portion of the strip adjacent to or a part of the east half of the northwest quarter of said section. We do not find that any competent evidence tending to prove the contrary was excluded. The decision of the court was therefore right on this branch of the case.

The instructions refused and those given and to which exception is taken relate to the question of adverse possession. The court having correctly decided that there was no jury question in reference to title, these errors drop out of the case.

The remaining question is whether the defendants had the right to counterclaim in this action for the damages sustained by them by reason of the trespass committed by the plaintiff on their property. *Fehrman's* damages were assessed at $8 and *Maas'* damages at $2.

A counterclaim may be set up for a cause of action connected with the subject of the plaintiff's action. Sub. 1, sec. 2656, Stats. The trial in the circuit court was primarily one to determine title to the disputed strip and incidentally to recover damages for the trespass committed thereon. The subject of the action was the plaintiff's primary right, together with the specific property involved. *McArthur v. Moffet,* 143 Wis. 564, 128 N. W. 445.

The plaintiff's cause of action being one to determine the title to real estate and for damages for the alleged trespass committed thereon, and the counterclaims being interposed to recover damages for invading the possessory right of the defendants to the same real property, it must be held under the doctrine of *McArthur v. Moffet, supra,* that the counterclaims were connected with the subject of plaintiff's cause of action and therefore properly pleadable in the action.

By the Court.—Judgment affirmed.

In re Citizens Savings & Trust Company.

February 7—February 24, 1914.

Corporations: Who may inspect books: Pledgee of stock: Insolvent trust company in hands of banking commissioner.

Where an insolvent trust company, organized under the laws of Wisconsin, is in the hands of the commissioner of banking for the purpose of liquidation, the circuit court may properly provide by order for the examination of the books, business documents, accounts, and securities of the company by a person who holds stock therein which has been transferred to him by indorsement in blank as collateral security, although such stock has not been transferred on the books of the company.

Appeal from an order of the circuit court for Milwaukee county: F. C. Eschweiler, Circuit Judge. *Affirmed.*

The appeal is by *A. E. Kuolt,* Commissioner of Banking, from an order requiring him to permit, in behalf of the *Milwaukee National Bank of Wisconsin,* an examination of the books and accounts of the Citizens Savings & Trust Company, and of the securities and property belonging to said company and the documents relating thereto, in the hands of said commissioner of banking.

For the appellant there was a brief by *Flanders, Bottum, Fawsett & Bottum,* attorneys, and *James G. Flanders,* of counsel, and oral argument by *Charles E. Monroe.*

For the respondent, *Milwaukee National Bank of Wisconsin,* there was a brief by *Miller, Mack & Fairchild,* and oral argument by *J. G. Hardgrove.*

Winslow, C. J. In this case it is held that where an insolvent trust company, organized under the statutes of Wisconsin (secs. 2024—77*i* to 2024—77*q*, Stats. 1911), is in the hands of the commissioner of banking for the purpose of liquidation, it is eminently proper for the circuit court to provide by order for the examination of the books, business documents, accounts, and securities of the institution (at such

convenient times as may not unreasonably interfere with the process of liquidation) by a person who holds stock in the corporation transferred to him by indorsement in blank as collateral security, although such stock has not been transferred on the books of the corporation. Secs. 1751, 1757, 2022, Stats. 1911; *State ex rel. Bergenthal v. Bergenthal,* 72 Wis. 314, 39 N. W. 566.

By the Court.—Order affirmed.

STATE EX REL. CITY CONSTRUCTION COMPANY, Appellant, vs. KOTECKI, Comptroller, Respondent.

February 24—February 27, 1914.

Municipal corporations: Special assessment certificates: Enforcement by "separate sale:" Statutes construed.

1. Ch. 71, Laws of 1901 (secs. 926—135 to 926—138, Stats.), does not apply to the city of Milwaukee, since the charter of that city authorizes it to enforce special assessment certificates issued to contractors and others "by separate sale of the lands affected thereby under the authority of the city."
2. The words "separate sale" in sec. 926—135, Stats., do not mean a sale for the delinquent special assessment separate and apart from the sale for other delinquent city taxes, but a sale by the city treasurer under authority of the city separate from the sale made by the county treasurer under the general statutes.
3. Where the same word or phrase is used in different sections of the same statute for different objects and in different context, it need not be given the same meaning in each section.
4. The provision in sec. 926—135, Stats., for filing the special assessment certificates with the comptroller in cities of the first class merely related to the mode of getting the certificates into the tax roll and within the power of collection and sale by the city treasurer, and effected no change so far as a sale by the city treasurer separate from the county sale was involved.

APPEAL from an order of the circuit court for Milwaukee county: F. C. ESCHWEILER, Circuit Judge. *Affirmed.*

The appeal is from an order quashing an alternative writ of *mandamus.*

The alternative writ was issued to compel the comptroller of the city of Milwaukee to proceed under ch. 71, Laws of 1901, now secs. 926—135 to 926—138, Stats., by accepting, filing, and including in his statement of special assessments to be placed in the next tax roll of the city of Milwaukee a special assessment certificate issued to the relator, a contractor, after the special assessment evidenced by such certificate had been placed upon the assessment roll, levied against the property benefited, and carried into the tax roll for collection under the provisions of the city charter.

Benjamin Poss, for the appellant.

For the respondent there was a brief by *Daniel W. Hoan,* city attorney, and *Clifton Williams,* first assistant city attorney, and oral argument by *Mr. Williams.*

The order appealed from was affirmed February 27, 1914, and the following opinion was filed March 17, 1914:

TIMLIN, J. The question presented is whether the statutes above referred to apply to the city of Milwaukee. In order to correctly apply these statutes we must keep in mind the situation in this state with reference to city charters at the time of their enactment. Prior to March 26, 1901, there were in this state cities having authority to issue to contractors or others in payment of some contracts special assessment certificates. City charters with reference to delinquent city taxes could be divided into two classes: First, those containing a provision authorizing a tax sale of the lands affected by such taxes by the city treasurer under authority of the city, but where state and county taxes delinquent were returned to the county treasurer and the lands thereby affected sold by the latter treasurer under the general statutes of the state. This class included the charter of Milwaukee, the charter of La Crosse (ch. 162, Laws of 1887), the charter of Janesville (ch. 221, Laws of 1882), and the old charter of Green Bay prior to 1882, and perhaps other cities. Second, those requiring

all city taxes as well as all other taxes delinquent and unpaid to be returned to the county treasurer by the city treasurer and the lands affected thereby sold by the county treasurer under the general statutes of this state. This included the general city charter (ch. 326, Laws of 1889, now appearing as ch. 40*a*, Stats.), and the city charter of Sheboygan (ch. 254, P. & L. Laws of 1868), the city charter of Oshkosh (ch. 183, vol. 2, Laws of 1883), the charter of Manitowoc (ch. 275, P. & L. Laws of 1870, as amended), the charter of the city of Racine (ch. 313, vol. 2, Laws of 1876, as amended), the charter of Madison (ch. 36, Laws of 1882), and perhaps others.

There is but one tax sale expressly authorized by each treasurer in either case. In the first class of cities the sale by the city treasurer was made for all delinquent city taxes and special assessments together, and in the second class the sale was made by the county treasurer for all taxes and special assessments together. *Smith v. Vandyke,* 17 Wis. 208; *Smith v. Ludington,* 17 Wis. 334; *Dalrymple v. Milwaukee,* 53 Wis. 178, 10 N. W. 141; *Sheboygan Co. v. Sheboygan,* 54 Wis. 415, 11 N. W. 598; *Hoyt v. Fass,* 64 Wis. 273, 25 N. W. 45; *Heller v. Milwaukee,* 96 Wis. 134, 70 N. W. 1111; *Wis. R. E. Co. v. Milwaukee,* 151 Wis. 198, 138 N. W. 642; *Williams v. Eau Claire Co.* 134 Wis. 543, 115 N. W. 140.

In the cities falling under the second class above specified this in time led to confusion in the accounts between such cities and the county, because the city was entitled to a credit against the county for all taxes returned as unpaid and delinquent, which taxes thereafter belonged to the county. If the county thereafter collected thereon more than the sum due from the city to the county for unpaid county tax, the city was entitled to a credit for the excess. Sec. 1114, Stats. 1898. Special assessment certificates issued to contractors and unpaid were held to be unpaid taxes within the meaning of this section. *Sheboygan Co. v. Sheboygan, supra.* Where the

county did not collect the delinquent taxes but bid in at the tax sale, and there was no redemption, it thus became and remained the owner of and indebted to the city for a demand belonging to the contractor. See opinion of Circuit Judge GILSON in brief of counsel in *Sheboygan Co. v. Sheboygan, supra; Jenks v. Racine,* 50 Wis. 318, 6 N. W. 818.

Ch. 71, Laws of 1901, was entitled:

"An act to provide against charging to counties the special assessment certificates issued by cities to contractors in payment upon contracts, and for the enforcement thereof."

The whole purview of this act, omitting for the instant particular phrases found therein, is in harmony with this title. No such difficulty of accounting was possible with reference to cities falling under the classification first mentioned, because the certificates, being considered city taxes, never reached the county treasurer at all. This alone is a pretty conclusive indication that such cities were not intended to be affected by the act in question.

The first section requires interest to be computed on the assessment certificate at the legal rate from its date to the time when the city treasurer is required to make return of delinquent taxes. This points to the return mentioned in the general statutes made to the county treasurer, for the city treasurer makes no return of delinquent taxes to himself. The second section expressly requires a return to the county treasurer of the special assessment certificate as delinquent taxes by the city treasurer and contains no limitation, but the language is general and applies to all special assessment certificates covered by the act. It also requires that the county treasurer shall proceed as in other cases of delinquent taxes with reference to all special assessments covered by the act or included in its provisions. It also provides that the delinquent tax shall not be charged to the county nor credited to the city. The third section provides for redemption of all tax certificates issued upon a sale for delinquent special

assessment certificates included in the act. This redemption is to be made in the same manner that redemption may be made from general taxes not city taxes. This third section also provides for the issue of a tax deed by the county clerk upon all tax certificates of the kind last mentioned included in the act. The fourth section makes other provisions relative to such tax certificates and gives the owner and holder of the assessment certificate of sale issued thereon any and all other remedies given by law for the collection of the same or in the collection of other tax certificates of sale in this state, except that he shall have no right to recover from the city issuing the assessment certificate or the county issuing the tax certificate of sale. These provisions are inappropriate to cities of the class first mentioned but appropriate to cities of the second class mentioned.

"It is a well settled rule for construing statutes that particular words ought not to be permitted to control the evident meaning of the context." *Williams v. McDonal,* 3 Pin. 331.

"The court will inspect the whole act, and, if the true intention of the legislature can be reached, the false description will be rejected as surplusage, or words substituted, in the place of those wrongfully used, which will give effect to the law." *Palms v. Shawano Co.* 61 Wis. 211, 21 N. W. 77.

"We are more especially bound to consider what is the object of the whole act, and what is the light thrown upon that object by every part of the statute. We may look chiefly at the preamble as stating 'the ground and cause of making the statute,' and as being 'a key to open the minds of the makers of the act and the mischief which they intended to redress.'" *McCaul v. Thayer,* 70 Wis. 138, 148, 35 N. W. 353.

"The meaning of the words of an act of Parliament is to be ascertained from the subject to which it refers, so that the same words receive a very different construction in different statutes. The intent of the legislature is not to be collected from *any particular expression,* but from a general view of the whole act of Parliament. These are not merely technical rules established by lawyers for the determination of questions arising on statutes, but they are maxims of common

sense, the observance of which is necessary to conduct us to a right understanding of every kind of written instrument." Id., citing *East India Interest,* 3 Bing. 196.

We must distinguish between special assessments and special assessment certificates, and between special assessment certificates and tax certificates issued upon a tax sale. When a street was acquired and laid out by purchase or condemnation or any paving or other improvement thereon was paid for by the city out of city funds, there was usually or often a special assessment laid upon the abutting lands benefited by the improvement to the amount of such benefit, not, however, exceeding the cost to the city of the improvement or acquisition. In such cases of special assessments there was no special assessment certificate against the land issued to contractors or others. A special assessment in such case appeared on the tax roll in a separate column and was really part of the city taxes and collected with other city taxes. But responding to an economic condition formerly prevailing in which money was scarce and land was plenty, charter provisions were enacted authorizing the city to let contracts for certain local improvements and to oversee and manage the making of such improvements and to pay the contractor with certificates of a board of public works or of some other city officer, which certificates were a lien in favor of the contractor and against the abutting land benefited. The city assumed no liability, the contractor had no claim under this contract against the city, but must look to the collection of these certificates for his pay.

Manifestly a statute should have been made distinguishing special assessments of this kind from the other special assessments mentioned. But this was not done except in some cases like the city charter of Superior, which provided for an action by the contractor to foreclose this special assessment certificate, and perhaps that remedy would be open to him at common law before the tax sale. But even the latter statute did not

remedy the difficulty when the contractor did not avail himself of such remedy and the special assessment tax was returned delinquent to the county treasurer. Ordinarily, however, there existed charter provisions permitting or requiring the collection of these assessment certificates in the manner provided for the collection of city taxes, including other special assessments, that is, by placing the amount on the tax roll for collection by the city treasurer under his tax warrant and a return as delinquent tax in case no collection was made by the city treasurer.

Counsel for relator contends that the words "by separate sale of the lands affected thereby," found in the first section of the act in question, must be taken to mean a sale for the delinquent special assessment separate and apart from the sale for other delinquent taxes, hence that the statute applies to cities of the class first mentioned. This is merely a repetition of the fallacy exposed in *McCaul v. Thayer,* 70 Wis. 138, 35 N. W. 353, and an interpretation in conflict with the rules there laid down. It conflicts with the whole purview of the act; it breaks a sentence into parts; it ignores the words, "under the authority of the city," an integral part of the sentence in which the other words are found. It overlooks the fact that there was no city charter in this state so far as discovered which provided for sales by the city treasurer for delinquent special assessments separate and apart from city taxes; and it fails to discriminate between the two kinds of special assessments mentioned, one of which properly belonged with and constituted a part of the city taxes, hence could not be well separately sold. The statute should be read with reference to its leading idea. *State ex rel. Minneapolis, St. P. & S. S. M. R. Co. v. Railroad Commission,* 137 Wis. 80, 85, 117 N. W. 846. We also consider such construction quite opposed to *Williams v. Eau Claire Co.* 134 Wis. 543, 115 N. W. 140, which holds that the mere absence of authority of the city treasurer to make any delinquent tax sale was

sufficient to bring that city within the purview of the statute in question. The construction contended for, on the other hand, would bring all cities in the state within the sweep of the statute in question. This might not be a bad result, but the statute bears indications that it was intended not for all but only for a class. We may here mention in passing that cities of the first class also falling within the first classification in this opinion have been relieved from some of their difficulties on this subject by ch. 203, Laws of 1905.

It is a legitimate argument in favor of the construction contended for by appellant that sec. 1 of the act in question made provision for filing the assessment certificate with the comptroller in cities of the first class and that there was but one city of the first class in this state, and that city was Milwaukee, whose charter authorized the city treasurer to make sales separate from the county sale for delinquent city taxes. But this provision for filing with the comptroller in cities of the first class merely related to the mode of getting these special assessment certificates into the tax roll and not at all to the return of delinquent taxes. Such filing brought the assessment certificate into the tax roll and within the power of collection and sale by the city treasurer. So that it effected no change in the former mode so far as a sale by the city treasurer separate from the county sale was involved. Compliance with this part of the statute still left the assessment certificate under the authority of the city treasurer, to be collected by him if possible; if not, to be embraced in his sale for delinquent city taxes. The relation in this case shows that at the time of demand upon the comptroller the assessment in question had reached and was upon the city tax roll for collection by the city treasurer under charter provisions. The case was therefore outside of this provision of the statute. Inferences from this provision of the statute tending to go beyond this are, we think, overborne by the general provisions of the act, which purport to regulate only sales by the county treasurer

resulting in confusion of accounts between the city and county.

In further aid of such interpretation counsel invokes the words of the second section, viz. that the county treasurer shall proceed, etc., and "sell said lands by separate sale for the nonpayment of such certificate." But in the first section the words "separate sale" are used to describe the class of cities affected by the act, in the second as a direction to the county treasurer. The object for which the words are used and the context differ in each section. Under such circumstances there is no room for claiming that the words in sec. 1 and those in sec. 2 should be given the same meaning.

"It is always an unsafe way of construing a statute or contract to divide it by a process of etymological dissection, into separate words, and then apply to each, thus separated from its context, some particular definition given by lexicographers, and then reconstruct the instrument upon the basis of these definitions. An instrument must always be construed as a whole, and the particular meaning to be attached to any word or phrase is usually to be ascertained from the context, the nature of the subject treated of and the purpose or intention of the parties who executed the contract, or of the body which enacted or framed the statute or constitution." 2 Lewis's Sutherland, Stat. Constr. 707, 708.

By the Court.—Order affirmed.

MARSHALL, BARNES, and VINJE, JJ., dissent.

SZELIWICKI, Respondent, vs. CONNOR LUMBER & LAND COMPANY, Appellant.

October 9, 1913—March 17, 1914.

Master and servant: Fellow-servants: Incompetency: Evidence: Judicial notice: Habitual negligence: Unsafe working place: Appeal: Questions not tried below: Remanding for new trial.

1. Employees of the same master, each handling boards, one throwing from the pile and the other picking up the boards and

loading them upon a wagon, were fellow-servants, although under the immediate direction of different subordinate foremen.

2. A servant may be incompetent because of physical or mental incapacity to perform the particular work to which he is assigned, with safety to himself and others. Incompetency may arise from mere youth, from inexperience, lack of practice, or habitual negligence.

3. The court will not take judicial notice that pushing or dropping boards from a lumber pile so as to strike the boards which men below are carrying away is an act necessarily dangerous to others or culpably negligent; and proof of several such occurrences in the course of a day's work is insufficient of itself to support a verdict that the employee was habitually negligent and therefore incompetent to do the simple work of taking down a lumber pile.

4. Proof that such acts were followed by a warning from the foreman to be careful and not to hurt anybody, with no evidence that the conduct was persisted in thereafter and no particular description of the acts done, while it has a probative quality as respects notice to the employer, falls short of establishing incompetency of the employee on the ground of habitual negligence.

5. The injury in this case having occurred after ch. 485, Laws of 1911, went into effect, and the question whether the defendant had, as required by said act (secs. 2394—41, 2394—48, Stats. 1911), furnished a working place which was as safe as the nature of the work would reasonably permit not having been considered on the trial or passed upon by the jury, the case is remanded for a new trial according to the law applicable thereto.

APPEAL from a judgment of the circuit court for Forest county: W. B. QUINLAN, Circuit Judge. *Reversed.*

Allan V. Classon, for the appellant.

For the respondent there was a brief by *Kaftan & Reynolds,* and oral argument by *R. A. Kaftan.* Upon the question of incompetency, they cited *Maitland v. Gilbert P. Co.* 98 Wis. 495, 72 N. W. 1124; *Kliefoth v. Northwestern I. Co.* 98 Wis. 495, 74 N. W. 356; *Kamp v. Coxe Bros. & Co.* 122 Wis. 206, 99 N. W. 366; *Johnson v. St. Paul & W. C. Co.* 126 Wis. 492, 105 N. W. 1048; *Hamann v. Milwaukee B. Co.* 127 Wis. 550, 106 N. W. 1081; *Odegard v. North*

Wis. L. Co. 130 Wis. 659, 110 N. W. 809; *Young v. Milwaukee G. L. Co.* 133 Wis. 9, 113 N. W. 59; *Zabawa v. Oberbeck Bros. Mfg. Co.* 146 Wis. 621, 131 N. W. 826; *Ludvigson v. Superior S. B. Co.* 147 Wis. 34, 132 N. W. 621; *Freeman v. Dells P. & P. Co.* 150 Wis. 93, 135 N. W. 540.

The following opinion was filed December 9, 1913:

TIMLIN, J. In this action for negligent injury sustained August 5, 1911, the jury returned a special verdict which entitled the plaintiff to judgment for $5,000. Recovery was based on the negligence of a fellow-servant of the plaintiff named Winkop. We do not find any other question in the case requiring discussion. The fifth question of the special verdict was as follows: "Was Winkop an incompetent employee for throwing down cross pieces from the pile on August 5, 1911?" The jury answered this question in the affirmative and the circuit judge refused to set aside the answer. It was assumed on the trial, and we think correctly, that Winkop and the plaintiff were fellow-servants. They were in the service of the same master, at work in the same lumber yard, each handling boards, one throwing from the pile and the other picking up the boards, and if Winkop was under immediate direction of one subordinate foreman and the plaintiff under the immediate direction of another subordinate foreman, this alone could not change their status as fellow-servants.

The work in which Winkop was engaged was of a very simple and ordinary kind. He was passing lumber from the top of a lumber pile down to other workmen who loaded it on a wagon. The pile was about twenty-five feet high, and when he took off a layer of boards he encountered several cross pieces which lay under that layer and over the next lower layer. These he was required to throw down upon another side of the pile and into an alley or driveway about twenty-three

feet in width. The testimony relating to his incompetency was as follows: Collins, a fellow laborer, testified:

"I had worked with him before that day, I should judge a month or so every day, doing different work around the yard. He was handing down boards most of the time. I saw no trouble to amount to anything about the way he did his work. The foreman told him to be careful the same as he did the rest of us. I saw him drop boards that hit other boards that men were picking up. I do not know whether it was in a careless way or not. The men picking up the boards did not like it. I saw him do that three or four or five times. I heard the foreman giving him hell for spitting on the lumber with tobacco juice. He was jawing at the Polish people. When a man would pick up a board, have it in his hand, he would drop a board and hit that one."

After being cross-examined with reference to former testimony of his in which he appears to have gone somewhat farther in the direction of incompetency of Winkop, he testified:

"*Q.* About how many times did you see this man drop boards on the boards that the men were picking up, carelessly? *A.* I don't know as I could say he dropped them real carelessly at all. It was not a great many times, I could not say how many, that I heard the men object to the way he was dropping the boards down. It might have been five or six or may be more. Kelner [the foreman] told him to be careful after there was trouble about him dropping the boards down and before. I do not think he told them anything else. He said not to hurt anybody."

Another witness, Klinkewicz, a workman, testified that Winkop had the reputation of being careless; that he heard that from a chore boy named Krueger and some fellow named Joe Homanie. Krueger worked in the yard on a wagon in the daytime and in the evening he was chore boy. Neither Krueger nor Homanie was called.

As we understand this testimony, it relates to occasions when Winkop was passing lumber down from the top of the

pile to those carrying it off below, and that he sometimes hit the boards they were carrying off with the boards he was letting down. The plaintiff was injured by one of the cross pieces thrown in the alley by Winkop in the regular discharge of his duty and not by any of the lumber passed down from the pile.

A servant may be incompetent because of physical or mental incapacity to perform the particular work to which he is assigned with safety to himself and others. The term "incompetent" when applied to an employee always has reference to the kind of work in which he is engaged. Mere youth may render one incompetent for some purposes, as for example a boy twelve or fifteen years of age is presumably incompetent to fill a position requiring him to give signals to the operator of a hoist when the lives or safety of others depend upon such signals being properly given. *Molaske v. Ohio C. Co.* 86 Wis. 220, 56 N. W. 475. A boy fifteen years old and inclined to be mischievous may be found incompetent to work in a sawmill cleaning up around revolving saws. *Zabawa v. Oberbeck Bros. Mfg. Co.* 146 Wis. 621, 131 N. W. 826. A boy sixteen and one-half years of age who sometimes failed to stop and start properly may be found incompetent to have charge of operating a passenger elevator. *Vogel v. Herzfeld-Phillipson Co.* 148 Wis. 573, 134 N. W. 141. An adult who, by reason of lack of experience or because long out of practice, does not stop and start a saw carriage properly or safely, may be found incompetent as a circular saw operator where the proper handling of the carriage is necessary to the safety of the lives or limbs of others. *Curran v. A. H. Stange Co.* 98 Wis. 598, 74 N. W. 377. An adult iron molder authorized to use gasoline for drying out molds, whereby the gasoline might become ignited and dangerous, may be found incompetent upon testimony of habitual negligence in the use of such fluid for this purpose. *Moering v. Falk Co.* 141 Wis. 294, 124 N. W. 402. See note to this case in 18 Am. & Eng.

Ann. Cas. 926. On the other hand one may be inexperienced and yet competent for some duties. *Chicago, St. L. & P. R. Co. v. Champion,* 9 Ind. App. 510, 53 Am. St. Rep. 357. So a servant may be negligent and at the same time competent. *Olsen v. North Pac. L. Co.* 100 Fed. 384, 40 C. C. A. 427. Incompetence is defined in *Maitland v. Gilbert P. Co.* 97 Wis. 476, 72 N. W. 1124, and *Kliefoth v. Northwestern I. Co.* 98 Wis. 495, 74 N. W. 356.

One difficulty with the evidence of incompetence in this case is that there is no evidence of physical or mental incapacity, and none of the acts relied upon to establish it were shown to have been negligent acts within the proper meaning of the term "negligence." *Brossard v. Morgan Co.* 150 Wis. 1, 136 N. W. 181. That is the distinction between the evidence here and that in *Moering v. Falk Co.* 141 Wis. 294, 124 N. W. 402. In the latter case the act was obviously dangerous to others. If we could take judicial notice that pushing or dropping boards off a lumber pile so as to strike the boards that the men below were carrying away was an act dangerous to others and one from which an ordinarily prudent person in the exercise of ordinary care ought to have anticipated some injury or damage to another, then we might take up the question of the sufficiency of the evidence to support a verdict of incompetency upon the basis that several acts of negligence had been shown in the doing of work similar to but not identical with that in which the plaintiff was injured. Manifestly we can take no such judicial notice. We have no particular or detailed description of how the work was done at the time. The series of acts on the part of Winkop may as well have been awkward acts or mistakes or ordinary occurrences in that kind of work, but the evidence falls short of showing that either of them was a negligent act or a dangerous act. As is said in appellant's brief: "There is no evidence that the most careful employee does not occasionally drop a piece of lumber in the manner it was testi-

fied that Winkop did." So it may indicate fault to expectorate tobacco juice on lumber, but this fault does not equal the gravity of negligence.

Summing up these errors and omissions on the part of Winkop, they are insufficient, singly or together, to support a verdict that he was an habitually negligent and therefore an incompetent employee for the purpose of carrying on the simple and rudimentary work of taking down a lumber pile. Here we have a simple occupation, a limited number of irregular acts, no act shown to be unusual or easily avoidable or ordinarily dangerous to others, or shown to specifically indicate recklessness or a mischievous disposition. True, the foreman had told Winkop to be careful after he had dropped the boards in the manner stated and also warned him not to hurt anybody. There is no evidence that Winkop persisted in his awkwardness or errors or carelessness after this warning. The warning itself, unsupported by any particular description of the acts done, while it has a probative quality on the question of notice to the employer, falls short of supporting a charge of incompetency on the ground of habitual negligence. It does not relate to the act that Winkop was engaged in doing at the time the plaintiff was injured although somewhat closely connected with it. This lack of evidence on the subject of incompetency is not supplied by the testimony of the witness Klinkewicz. That testimony is very weak and bore more particularly on notice to the employer. *Mocring v. Falk Co.* (141 Wis. 294, 124 N. W. 402) 18 Am. & Eng. Ann. Cas. 926, and cases in notes. The injury in question having been inflicted by the negligent act of a fellow-servant whose incompetency was not shown, the judgment must be reversed, and the cause remanded with directions to enter judgment dismissing the complaint.

By the Court.—It is so ordered.

BARNES, J., took no part.

The respondent moved for a rehearing.

In support of the motion there was a brief by *Kaftan & Reynolds,* attorneys, and *P. H. Martin,* of counsel, and in opposition thereto a brief by *Allan V. Classon,* attorney, and a separate brief by *Goggins & Brazeau,* of counsel.

The following opinion was filed March 17, 1914:

PER CURIAM. The respondent's attorneys move for a rehearing in this case, presenting for the first time to our notice that the injury occurred after the enactment of ch. 485, Laws of 1911. The statute went into effect June 30, 1911, and the plaintiff was injured August 5, 1911. The statute abolishing the defense of assumption of risk and the so-called fellow-servant defense did not go into effect until September 1, 1911. Ch. 50, Laws of 1911. The decision as written rests solely on what is conceived to be the common law regulating the relations of master and servant. It was considered that there was shown no case of concealed or latent danger and the work was being done by the employer in the ordinary and authorized manner, and upon the argument in this court the case turned on the question of the incompetence of the fellow-servant whose negligent act caused the injury. With the change made by ch. 485, *supra,* a different case might be made out even if the negligence of a fellow-servant contributed to cause the injury. That case, however, has not been tried. No jury has yet passed upon the question whether the place was as safe as the nature of the work would reasonably permit or upon any of the other questions which might arise under ch. 485, *supra.* It is therefore considered that the reversal already ordered may stand, but that the cause should be remanded for a new trial according to the law applicable thereunto.

By the Court.—It is so ordered.

The motion for rehearing was denied without costs.

ESTATE OF WELLS. (Five appeals.

October 31, 1913—March 17, 1914.

(1–4, 10) *Wills: Trusts: Construction: "Net income:" Division of receipts between income and* corpus *of estate: Powers of executors and trustees: Dividends on corporate stock: Earnings added to surplus: Discretion of directors: "Capital invested" and capital stock.* (5, 6) *Apportionment of fees and expenses: Value of services: Opinion evidence not binding on court.* (7, 8) *Bonds bought or held at premium: What part of interest is net income: Sinking fund.* (9) *Final accounting of executors: Questions considered: Appeal to circuit court.* (11, 12) *Guardians* ad litem: *Compensation: Excessive allowances.*

1. A will, which clearly evinced the intent of the testator that the principal or *corpus* of his large estate should be carefully conserved and kept intact for many years after his death, devised the estate to executors and trustees to hold during the term of two lives and nineteen years thereafter, and vested in such trustees unusually broad and comprehensive powers. Among other things, it directed them to pay over the "net annual income" of the estate to certain beneficiaries, and further directed that in determining such income for any year "only such portion of any dividend received upon any stock in any corporation belonging to my estate, shall be considered as the income of my estate as shall be paid by such corporation out of its net annual earnings for that year, and that all such portions of any dividend received upon any such stock as shall be paid by such corporation from the sale of its property, shall be considered by my said executors and trustees, respectively, as principal and as merely a division among the stockholders of the property of the corporation." Testator further directed that the judgment and decision of said executors and trustees "shall be final in ascertaining how much of every dividend received upon any shares of capital stock shall be considered as income received from the profits of the corporation for that year upon the capital invested," and that "only such portion of any dividend as shall be determined by my said executors or trustees, respectively, to be the annual profits of the corporation for that year upon its capital invested, shall be paid out as the net annual income for that year of my estate or of any share thereof," and that the portion of any and every dividend determined by said executors or trustees to be the proceeds of the sale of the

property of the corporation shall be reinvested by them, as a mere change in the form of the investment of that portion of the estate. *Held*, that the corporations referred to were not corporations which the executors were by the will directed or authorized to create, but were corporations in which the testator owned stock at the time of his death; that the words "capital invested" did not mean capital stock, but the property or means of the corporation; and that the direction as to division of dividends was not limited to cases where the corporation had made sale of some large portion or the whole of its property and had formally or practically divided the proceeds among the stockholders.

2. Where a testator establishes a trust in corporate stock for the benefit of a life tenant, with remainder over to another, dividends on the stock which are not paid out of the earnings but are really divisions of the capital of the corporation constitute a part of the principal of the trust and should not be treated as income, unless the testator intended that they should be so treated.
3. The *capital* of a corporation is the property or means which the corporation owns, and it may vary in amount, while the *capital stock* is fixed, and represents the interests of the stockholdholders and is their property.
4. Under the provision of the will above stated, the determination of the executors and trustees as to the apportionment of dividends between income and *corpus* of the estate must be deemed final and conclusive on every beneficiary, in the absence of bad faith, fraud, or mere arbitrary action.
5. The fees and expenses of the executors in matters relating purely to the administration of the estate being properly chargeable to *corpus*, and their fees and expenses as trustees in the management of the trust property being properly chargeable against the income, the apportionment of such fees and expenses made by the trial court is affirmed, not being against the preponderance of the evidence.
6. As to the value of the services of the executors and the proportionate amount chargeable against the two funds, the trial court was entitled to exercise its own judgment and was not bound by the testimony of witnesses.
7. Where a trust is created in funds of which the income is to be paid to certain beneficiaries for life and the principal to others on the termination of the life estate, and the trustees invest a part of the funds in securities at a premium, the trustees should take from the annual income and add to the *corpus* such sum as will under established rules at the maturity of the

securities repay to the *corpus* the amount paid as premium, and pay to the life tenant the balance only of the annual income.

8. Whether there is any logical difference in the rules of law which should apply to securities held by the testator at a premium and to securities purchased by the executors at a premium, is not decided in this case. It being clear that the testator intended primarily that the principal or *corpus* of the estate should at all hazards be preserved intact, it is *held* that, as to both classes of securities above mentioned, sinking funds were properly created by setting aside a portion of the annual interest received thereon, and that such sinking funds should remain in the *corpus* of the estate notwithstanding the subsequent sale of some of the securities at a price which left a small balance in the sinking fund.

9. In a proceeding for the settlement of the final account of executors, the whole subject of their handling of the estate is open for consideration in the county court and also, *de novo*, upon appeal to the circuit court; hence the mere fact that certain matters properly within the scope of the proceeding were not suggested or considered in the county court does not preclude consideration thereof and action thereon in the circuit court; and no special petition for consideration of such matters is necessary.

10. Courts will not, in the absence of fraud, bad faith, or wilful abuse of discretionary power, interfere with the discretion of corporate directors and compel the declaration of a dividend; hence, although in this case the executors as individuals owned stock in certain corporations, which together with the stock owned by the estate constituted a majority of the stock, and did not compel an annual distribution of the earnings of such corporation but permitted such earnings to be added to the surplus account, thus enhancing the value of the stock, the court should not, in the absence of bad faith or fraud, surcharge the executors' account by taking from the *corpus* of the estate the amount of such enhancement and treating it as income.

11. Guardians *ad litem* are public officers of justice. Their work is primarily and chiefly the performance of a duty imposed by the court upon its own officers to aid it in the administration of the law; and the "compensation" which, under sec. 4041*b*, Stats., may be allowed to them means a reasonable charge, not measured by the high salaries or rewards for services which large establishments and wealthy clients may voluntarily pay to lawyers of their choice, but measured more nearly by the

compensation which the law allows to public officers having similar duties.

12. Allowances to guardians *ad litem* in this case amounting to about $33 per day for days spent in court, and $17.50 per day for days spent out of court, are *held* to be too large by about fifty per cent.

APPEALS from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Modified and affirmed.*

There are in this case five separate appeals from a judgment of the circuit court allowing the final account of the executors of the will of Daniel Wells, Jr., and assigning the estate to said executors in their capacity as trustees under the will. The judgment modified in certain respects the judgment of the county court and affirmed it as so modified. The executors appeal from certain provisions of the judgment, and certain of the beneficiaries appeal from other provisions thereof.

The will in question was before this court for construction in the case of *Stephenson v. Norris,* 128 Wis. 242, 107 N. W. 343. Many of the provisions of the will are there stated and so far as possible repetition of them will be avoided. Mr. Wells possessed a very large estate, running well up into the millions, and he desired to have the principal kept together in the hands of trustees for a long period. He devised practically his entire estate to *Isaac Stephenson, Horace A. J. Upham,* and Charles F. Ilsley (their survivors and successors in trust), to hold the same during the life of his daughter, Fannie Wells Norris, and her son, *Daniel Wells Norris,* and nineteen years thereafter (with a certain exception immaterial here). He directed his executors to divide the estate into eighty-one shares, convert the same into money, organize corporations if they deemed best and hold the shares during the trust period, and pay over the net income thereon to certain beneficiaries, many of whom were then and now are

minors, and some of whom are appellants in this action. The names of the various beneficiaries of the trusts so created, with their respective shares, are given in the statement preceding the opinion in the *Stephenson Case, supra,* and need not be repeated here. At the close of the trust period the principal of the trust estate was to be paid to certain beneficiaries or classes of beneficiaries named in the will. The estate was to be divided into the eighty-one shares within five years after the death of the testator (that death took place March 18, 1902), but the executors and trustees were authorized and directed to pay the net annual income of the estate quarterly to the beneficiaries of the income before the actual division of the estate into eighty-one parts in such shares as they would have been respectively entitled to receive had the division been made immediately after the testator's death. Very large discretionary powers were given to the trustees and executors as to the division of the property among certain classes of the beneficiaries, even to the extent of withholding shares entirely if the particular beneficiary should be deemed by them unworthy or incompetent to receive or manage the same. These provisions are fully set forth in the statement of the *Stephenson Case, supra.*

The will contained the usual directions that the executors were to pay the testator's debts, funeral expenses, and the expenses of administration, also a bequest of $150,000 to the executors who should qualify and act. The provisions of the will which have the greatest bearing upon questions raised by the present appeals are as follows:

"*Item twenty-second.* I direct that my said executors and trustees, the survivors and survivor of them and their successors in trust shall be allowed a reasonable sum for their compensation, to be paid to them yearly from my estate and for their expenses and for the employment of agents in the proper management of my estate and the trust funds committed to their care, and I do hereby declare that the sum bequeathed to my said executors by item fourth of this will is not intended to be in lieu of other proper compensation.

"In determining the net annual income of my estate and of any share or part thereof, I direct my said executors and trustees, the survivors and survivor of them and their respective successive successors in trust, respectively, to deduct from the income of the year all expenses of every kind incurred by them in the management and care of my estate, including repairs, improvements, assessments, taxes and other disbursements thought best by them to be made to protect, to improve, to make valuable or to preserve the same; provided, however, that said executors and trustees, the survivors and survivor of them and their respective successive successors in trust, respectively, shall have the right, in determining the net income of my estate and of any share or part thereof, for any one particular year, to distribute any extraordinary expense or disbursement over a series of years, as said executors or trustees, the survivors or survivor of them or their respective successors in trust, respectively, shall deem advisable. I authorize my said executors and trustees, the survivors and survivor of them and their respective successive successors in trust, respectively, to employ such agents to assist in the management and care of my estate and carry out the terms of this will as they, respectively, shall deem best, and to pay them a reasonable compensation.

"*Item twenty-third.* In determining the net annual income of my estate for any year while in the hands of my said executors and of any portion in the hands of my said trustees, I direct that only such portion of any dividend received upon any stock in any corporation belonging to my estate, shall be considered as the income of my estate as shall be paid by such corporation out of its net annual earnings for that year and that all such portions of any dividend received upon any such stock as shall be paid by such corporation from the sale of its property, shall be considered by my said executors and trustees, respectively, as principal and as merely a division among the stockholders of the property of the corporation, and I direct that the judgment and decision of my said executors and trustees, respectively, shall be final in ascertaining how much of every dividend received upon any shares of capital stock shall be considered as income received from the profits of the corporation for that year upon the capital invested, and I direct that only such portion of any dividend as shall be determined by my said executors or trustees, respectively, to be the annual profits of the corporation for that year upon its capital

invested, shall be paid out as the net annual income for that year of my estate or of any share thereof, and that the portion of any and every dividend that shall be determined by my said executors or trustees respectively, to be the proceeds of the sale of the property of the corporation and as a division thereof among its stockholders, shall be reinvested by my said executors and trustees, respectively, as a mere change in the form of the investment of that portion of my estate."

The executors proceeded to administer the estate, divide the same into eighty-one parts as directed, and to carry out the trusts created by the will, making quarterly payments of net income as determined by them to the beneficiaries as directed by the will. Prior to the expiration of the five-year period, they filed their final account as executors, which covered not only the administration strictly so called, but all their transactions as trustees. That account is under consideration in the present case.

Glenway Maxon, for the appellant *Daniel Wells Norris.*

For the executors there were briefs by *Alfred L. Cary* and *William E. Black,* and oral argument by *Mr. Black.*

Frank B. Van Valkenburgh, guardian *ad litem,* for the appellants and respondents *Alice Agnes Pratt* and others.

John F. Harper, guardian *ad litem,* for the appellants and respondents *Sumner W. Parker* and others.

For the appellants and respondents *Andrew Comstock Dickson* and others, the cause was submitted on the brief of *Guy D. Goff,* guardian *ad litem.*

George D. Van Dyke, guardian *ad litem,* for the respondents *Mabel Decker Ferguson* and others.

The following opinion was filed December 9, 1914:

WINSLOW, C. J. When this will was before us for construction upon the former appeal (*Stephenson v. Norris,* 128 Wis. 242, 107 N. W. 343), the following language was used

in the opinion with respect to the general scheme and purpose of the testator:

"There can be little or no doubt as to the general character of that scheme. The testator was a man of great wealth. He evidently viewed his estate as a great business enterprise, an entity which he desired should be kept substantially intact for many years after his death. He therefore placed it in the hands of trusted persons with the most full and carefully specified powers, for the benefit, ultimately, of his father's descendants. His desire that it should remain an entity, presumably as a great corporation, with the beneficiaries as stockholders, is very apparent. The duration of the trusteeship as contemplated might be well towards a century. Many of the ultimate beneficiaries were yet to be born, and of their character or abilities he could know nothing, and so, in order to conserve the property, save it from dissipation by unknown beneficiaries, and insure its enjoyment by the members of his father's family, with due regard to their various needs and abilities, he evidently intended to vest unusually broad and comprehensive powers in his trustees and their successors."

The re-examination of the provisions of the will which we have been compelled to make upon the present appeal has not changed in any respect our estimate of the testator's intentions, but rather tended to confirm the conclusions then expressed. Those conclusions may perhaps be said to be the keynote, not only of the former decision, but of the present.

There are many assignments of error, but we do not find it necessary to state them in detail. Many of them involve the same question and the remainder may be classified into a few general groups, and the propositions involved may be treated abstractly rather than concretely.

The most important questions arise under item 23 of the will, and relate to the division of the dividends received from various corporations. The executors at the end of each year of their administration divided the dividends received by them during the preceding year from certain of the corpora-

tions in which the testator held stock, and credited a part of such dividends to the legatees named in the will as beneficiaries of income (hereinafter called the life tenants), and credited the balance to the *corpus* of the estate. They did this under the authority given them, as they supposed, by item 23 of the will, which directs that only that part of corporate dividends shall be considered as income which shall be paid out of the net annual earnings of the corporation for the year, and that any dividend paid out of the sale of corporate property shall be reinvested and added to the *corpus* of the estate.

It will not be necessary or useful to make any detailed or exact statement of these various transactions. Mr. Wells owned large amounts of stock in various lumbering and mining corporations at the time of his death, from which his executors received very large dividends during the accounting period. One of the lumber companies (the H. Witbeck Company) was closing out its business during that time, while another (the N. Ludington Company) was largely reducing its acreage of timber lands by extensive cutting of timber and manufacturing and selling the same. The executors each year determined what percentage of the dividends received by them from the various corporations was really income and what percentage represented sales of corporate property, and withheld the latter percentage from the life tenants, and added the same to the principal or *corpus* of the estate. In the case of the Homestake Mining Company there was an equal division between *corpus* and income; in the case of the lumber companies named, as well as some others, the percentage credited to principal was very largely in excess of the percentage credited to income.

It is admitted that in making these divisions the executors acted in good faith, but it is claimed on the part of the life tenants that they possessed no authority to make any such division, and that even if they had such authority they acted

upon wrong valuations and mistaken conceptions of their powers.

In support of these contentions it is first said that the corporations referred to in item 23 of the will are the corporations which the executors are directed or authorized to create by the terms of the will, and not the corporations in which Mr. Wells owned stock at the time of his death. We reject this contention without discussion. It is perfectly apparent to our minds that this is not what the testator meant.

It is next argued in substance that the words "capital invested" mean capital stock, and not the property or means of the corporation, and that the direction as to division of dividends only applies when a corporation has sold some large portion or the whole of its property and has made, either formally or practically, division of the proceeds of the sale among the stockholders. We deem this contention also untenable and will briefly state the considerations which lead us to this conclusion.

The intent of the testator to carefully conserve and keep intact the principal or *corpus* of his magnificent estate during the entire trust period is apparent in almost every line of the will. He was manifestly proud of this great creation of his own industry, and he felt that desire to have it perpetuated as a great business enterprise and an enduring monument to his own memory that many men similarly situated seem to have. The income was very large and every beneficiary would be very generously treated under any theory of the provisions of the will. Mr. Wells was a lawyer himself, and the will bears evidences of having been drawn with the utmost care by an experienced lawyer. If it was meant that the executors were to make a division of corporate dividends only when the corporation had made sale of its property and formally or practically divided the proceeds among stockholders, it would have been very easy to say so, and indeed there would, in that case, have been little need of the elaborate pro-

visions for the exercise of judgment on the part of the executors. Not only this, but it is to be remembered that there is a well established legal principle that, where a testator establishes a trust in property for the benefit of a life tenant with remainder over to another, and the property is of a wasting nature, such as mining stock or land stock, the dividends on which represent in part a practical diminution of corporate assets, in the absence of a clear expression of the testator's intention to the contrary the life tenant will be entitled to receive only the current rate of interest on the value of the trust property, and the remainder of the dividends will become a part of the principal of the trust fund, to be invested anew by the trustee. Lewin, Trusts (8th ed.) pp. 298–300; Loring, "A Trustee's Handbook" (3d ed.) p. 126.

The principle is sometimes stated thus: "If dividends are not paid out of earnings, but are really divisions of the capital of the corporation, they constitute a part of the principal of the trust and should not be treated as income in the absence of a contrary intention of the creator of the trust." Howes, Am. Law Relating to Income and Principal, p. 17; *Heard v. Eldredge,* 109 Mass. 258.

The careful provisions of item 23 make it very clear to our minds that the testator did not intend anything contrary to this legal principle, but that he did intend to charge his executors and trustees with the affirmative duty of keeping the principal of the estate at all times intact, and of seeing that moneys which, though called income or dividends, in truth represented a diminution of the property of the estate should not be paid out to the life tenants.

The argument that the words "capital invested" should be construed as meaning capital stock does not seem to us of any serious force. The word "capital" is sometimes used as the equivalent of capital stock, but it is probably more frequently used to mean the corporate property. This subject was quite fully treated in the case of *Wells v. Green Bay &*

M. C. Co. 90 Wis. 442, 64 N. W. 69, where it was said: "There is a distinction between the capital and the capital stock of a corporation. The capital of a corporation is the property or means which the corporation owns, and it may vary in amount, while the capital stock is fixed, and represents the interests of the stockholders, and is their property." Numerous cases were there cited in support of the proposition which need not be again cited here.

It is doubtless true that the executors in dividing the dividends received by them between income and *corpus* took good care to make such a division as would render it certain that the estate should not be diminished, and it may well be that in some instances it has turned out, or may in the future turn out, that the *corpus* has been actually increased by placing too large a percentage of dividends to its credit. This result, however, does not call for any criticism of the acts of the executors, nor for any interference by the court with their conclusions. The testator placed the most implicit confidence in them, and gave them the fullest and freest control over the property, subject only to the definite limitations which he deemed necessary in order to accomplish the results which he wished to accomplish, and he further said specifically in item 23 that "the judgment and decision of my said executors and trustees respectively shall be *final* in ascertaining how much of every dividend received upon any shares of capital stock shall be considered as income received from the profits of the corporation for that year upon the capital invested." It would seem that words could go no further in the effort to place absolute discretionary powers in the hands of his executors in this regard. Doubtless he appreciated that the questions arising under this power would be delicate and difficult questions, not capable of mathematical certainty of decision, but requiring the weighing and balancing of probabilities without reaching any absolutely accurate result. Apparently he appreciated also the probability of legal contests

over these questions, and wished to close the doors to litigation so far as he could do so. In view of all these considerations, we cannot doubt that he concluded to make the executors' decision final and conclusive on every beneficiary. It was perfectly competent for him to do so, and it is the duty of the courts to see that his wish is fully carried out. In the absence of bad faith, fraud, or mere arbitrary action (neither of which is claimed), the executors' determination must be held conclusive. The word "final" has but one meaning, and that meaning is in no respect doubtful.

The circuit court, while holding that the corporations referred to in item 23 of the will were the corporations in which Mr. Wells owned stock at the time of his death and that the executors had power under the will to make division of the dividends between income and *corpus,* took considerable testimony as to the circumstances under which the various dividends were declared, the condition of the various corporations at the time of the declaration of the dividends, the sources from which the money used in paying dividends was derived, and the value of the property of each corporation, especially the value of the stumpage owned and cut by the lumber corporations. Upon this testimony the court made findings disapproving of the apportionment between *corpus* and income made by the executors of the dividends received from the Homestake Mining Company, the N. Ludington Company, and the H. Witbeck Company, and determined that in each case considerably larger sums represented profit and should be credited to income than had been credited by the executors. Had these questions been ordinary questions of fact to be originally determined by the court from the evidence before it, we should have no difficulty in approving the conclusions reached by the court, but such was not the case. The apportionments already made by the executors were final and conclusive unless made fraudulently or arbitrarily or as the result of a mistaken conception of their duty. The sit-

uation is precisely analogous to that which arises when by agreement of the parties a matter in difference has been submitted for decision to a referee or arbitrator. In such case the award is conclusive unless it can be impeached for fraud, misconduct, or mistake, and it is to be noted that mistake here does not mean error in judgment on matter of fact or law, but a failure to know some material fact or legal right in the light of which their judgment should have been, but was not, exercised. *Consolidated W. P. Co. v. Nash,* 109 Wis. 490, 503, 85 N. W. 485; *Burnham v. Milwaukee,* 100 Wis. 55, 75 N. W. 1014. Approaching the question from this standpoint, there can be no doubt that the trial court was wrong in interfering with the apportionment made by the executors. It cannot be claimed for a moment that there was any fraudulent or arbitrary conduct on their part, nor any failure to know any material fact or legal right which should have entered but did not enter into their deliberations or conclusions. Their judgment may have erred in favor of the *corpus* of the estate and against the income, but it was their judgment which Mr. Wells relied on,—not the judgment of the circuit court. He knew the questions were delicate and that human judgment is always subject to error, and so knowing he made their judgment final. It was their judgment which he wanted, not the judgment of any court.

So much of the judgment of the circuit court as sets aside or changes the apportionments between *corpus* and income made by the executors and has been appealed from in this appeal must be stricken out, and the conclusions of the executors reinstated and approved.

The next important question to be considered is the question as to the proper division between income and *corpus* of the fees of the executors during the administration. Both the county and the circuit courts properly held that under the provisions of item 22 of the will the fees and expenses of the executors incurred in carrying out their duties as trustees

should be charged against the income, in order to ascertain the net income. This holding made it necessary to distinguish between those duties of the executors which related purely to the administration of the estate and those duties and services which related to the management of the trust property, in order that only fees and expenses relating to the first class of duties and services should be charged to *corpus,* and those relating to the second class to income. Considerable testimony was taken on the question as to the amount of the fees and expenses properly chargeable to each class of services. The gross sum was not in dispute, but it was manifestly a matter of great difficulty to make any accurate division in many of the items. The executors' fees for the whole period aggregated $98,972.17, of which amount *Mr. Upham* (who had the active business management of the estate) received $54,000, and the other executors $44,972.17. The county court concluded that only five per cent. of the fees paid to *Mr. Upham,* viz. $2,700, represented services in the administration of the estate and were chargeable to *corpus,* while the balance of *Mr. Upham's* fees, as well as the entire amount of fees paid to the other executors, represented services in the carrying out of the trust and were chargeable to the income. The circuit court, however, concluded from the whole evidence that ninety per cent. of the entire amount of the executors' fees related to management and care of the trust property and should be charged against income, and ten per cent. related to mere administration and should be charged to *corpus.* This is rather a question of fact than of law. As to the value of the services and the proportionate amount thereof chargeable against the two funds the court was entitled to exercise its own judgment and was not bound by the testimony of witnesses. We feel unable to say that the finding of the circuit court is against the preponderance of the evidence on this question, and hence there must be an affirmance so far as these items are concerned. Upon prac-

tically the same principles the division made by the circuit court between *corpus* and income of all of the items of disbursements must be affirmed without detailed mention.

Complaint is made of the conclusions of the circuit court as to the disposition of the sinking funds created by the executors in order to meet possible shrinkage in value of United States bonds held by them. Those conclusions were that as to certain United States bonds held by the deceased and which were still owned by the estate, which according to the appraisal of the estate commanded a considerable premium at the time of the decease, the executors rightfully set aside and credited to *corpus* a portion of the annual interest received upon them to meet the shrinkage on their value as they approach maturity; but that as to bonds which had been resold by the executors (whether owned by the deceased at his death and appraised at a premium, or afterwards purchased by the executors at a premium), so much of the sinking fund previously set aside by them as was not needed to make good the difference between the appraisal (in case of bonds owned by the deceased) or the cost (in case of bonds purchased by the executors) and the sales price, should be taken from *corpus* and credited to income.

This court has definitely adopted the principle that where a trust is created in funds of which the income is to be paid to certain beneficiaries for life and the principal to others on the termination of the life estate, and the trustees invest a part of the funds in securities at a premium, the trustees should take from the annual income and add to the *corpus* such sum as will under established rules at the maturity of the securities repay to the *corpus* the amount paid as premium, and pay to the life tenant the balance only of the annual income. As only the face of the obligation will be paid at maturity, it is evident that the *corpus* of the estate will lose the amount paid as premium unless some such course be pursued. In other words, when securities are at a premium the annual

interest payment represents not only the interest on the investment, but a part of the premium paid for the security which is necessarily a part of the principal, and cannot be justly paid to the life tenant if the remainderman is to receive that to which he is entitled. *In re Allis's Estate,* 123 Wis. 223, 101 N. W. 365. In that case the principle laid down in *New England T. Co. v. Eaton,* 140 Mass. 532, 4 N. E. 69, was quoted and approved as follows:

"There can ordinarily be no better test of the true income which a sum of money will produce, having regard to the rights of both the tenant for life and the remainderman, than the interest which can be received from a bond which sells above par, and is payable at the termination of a fixed time; deducting from such interest, as it becomes due, such sums as will at maturity pay the premium."

It is also held in the case cited that even though the securities may appreciate in value, so that they would sell for a larger sum than would be necessary to restore to the *corpus* of the estate that which was taken from the estate to purchase them, still the rule is not changed, because this would give the profit occasioned by the rise in market value to the life tenant, although such tenant is not responsible for the loss if the market goes the other way. The life tenant is not entitled to the chance of profit unless he also bears the corresponding chance of loss.

It is true that it has been held by the supreme court of New York (*McLouth v. Hunt,* 154 N. Y. 179, 48 N. E. 548), that, in case of trust securities transmitted by the testator, the question whether the depreciation of the premium resulting from approaching maturity of the bonds should be borne by the life tenant is to be determined by the intention of the testator as gathered from the will in the light of the relationship of the parties and the surrounding circumstances. In that case the will provided that the life tenants should receive the "full income," and it was held that the intention of the

testatrix evidently was that they should receive the full amount of the annual interest.

It is unnecessary in this case to decide whether there is any logical difference in the rules of law which should apply to securities held by the deceased at a premium and to securities purchased by the executors at a premium. We are quite well convinced that the will in the present case shows very clearly that the testator intended primarily that the principal or *corpus* of the estate should at all hazards be preserved intact. The use of the words "net income" in indicating the amounts paid to the life tenants and the abundant powers which he gave to his executors to finally determine the amount of the "net income" are very persuasive. Our conclusion is that as to both classes of securities the sinking funds were properly created and added to the *corpus,* and should have remained in the *corpus* notwithstanding the subsequent sale of some of the securities at a price which left a small balance in the sinking fund. In this respect the judgment of the circuit court must be modified as indicated.

When the appeal in this case reached the circuit court there was filed by the appellant *Daniel Wells Norris* a long petition asking that certain alleged issues be tried and determined upon the appeal. Some of these issues were academic in their nature, and contemplated that the court should answer a series of questions as to the proper construction of certain parts of the will, and give its opinion as to the rights and duties of the trustees, the life tenants, and the remaindermen under the will. So far as these questions were legitimately involved in the settlement of the final account, the petition was unnecessary, for all those questions were brought before the court by the appeal. So far as those questions were not necessarily or legitimately involved in the settlement of the final account, they had no proper place in the trial.

Certain new matters were, however, presented to the court

in the petition which we think were entirely proper to be presented and considered, notwithstanding the fact that they had not been submitted or passed upon by the county court.

Briefly and without entering into details, the facts alleged were in substance that the directors of certain of the corporations in which the estate was largely interested as stockholder did not annually distribute the earnings of those corporations, but added the same to the surplus account, thus enhancing the value of the stock, and the claim was made that the amount of enhancement to the stock held by the estate in each case should be taken from the *corpus* and apportioned to income by the executors, and paid out by the executors to the life beneficiaries who were such October 31, 1906, with interest from that date. This claim was founded on the proposition that inasmuch as the executors as individuals owned stock in the corporations which, together with the stock owned by the estate, constituted a majority of the stock, they should have compelled the declaration of dividends by the corporations, and not having done so may be compelled in this proceeding to account to the life beneficiaries as if dividends had actually been declared.

We pass the objection made by the executors, that these claims are new matter and cannot be brought into the case on the appeal because they were not suggested or claimed in the county court, with but one remark. The question before the county court was the proper settlement of the final account of the executors. The whole subject of their handling of the estate from start to finish was open for consideration in both county and circuit courts. To hold that because certain items which should have gone into the account in the county court could by virtue of that omission be barred from consideration upon the appeal in the circuit court would be little short of ridiculous. The case comes to the circuit court for a trial *de novo* of all questions relating to the dealings of the executors with the trust funds, and none of those dealings can

be barred out because omitted in county court. But we do not think that the circuit court was right in its conclusions on these claims. Courts will not interfere with the discretion of corporate directors and compel the declaration of a dividend in the absence of fraud, bad faith, or wilful abuse of discretionary power. *Morey v. Fish Bros. W. Co.* 108 Wis. 520, 529, 84 N. W. 862. By compelling the trustees to transfer from the *corpus* of the estate to the income the sums which the trial court holds should have been declared as dividends, the court substantially decides that the executors were guilty of bad faith; but, as said before, there is no claim here that the executors were guilty of bad faith or fraud in any of their acts, and the trial court has found none. Were there such a finding, we should be slow to say that the court could not surcharge the account in favor of the life beneficiaries in precisely the way it has done, even in the absence of the corporations themselves from the litigation, but without that finding we are fully convinced that it cannot do so. An increase in the value of the *corpus* of the estate, resulting simply from the lawful and proper increase of the surplus of one of the corporations in which it holds stock, does not become income under the terms of the will. In this respect the judgment cannot be approved.

There are a number of minor contentions made on the merits of the case which have been examined, but are not considered meritorious, and which are overruled without comment.

Before closing this opinion we are compelled, however, to consider the question as to the propriety of the allowances made by the circuit court to the various guardians *ad litem* who represented the interests of the minor beneficiaries in that court. By the judgment the following sums were allowed to the guardians, viz.:

Frank B. Van Valkenburgh	$4,349 75
John M. W. Pratt	800 00
Charles A. Vilas	135 00

John F. Harper	$1,150 00
Guy D. Goff	1,100 00
William D. Van Dyke	335 00
William W. Wight	500 00
F. H. Bottum	165 00
G. D. Van Dyke	800 00

All of these sums (except the sum allowed to Mr. Wight) were ordered to be paid out of the *corpus* of the estate, because the minors respectively had no available property out of which the court could direct payment. Mr. Wight's ward having a present available interest in the estate, his fees were made a lien upon that interest and no appeal has been taken from that part of the judgment.

It is admitted that the court had power under the provisions of ch. 267, Laws of 1907 (now sec. 4041*b*, Stats. 1911), to make an order of this nature, but the question is whether the sums allowed can be held to be proper sums under the terms of that statute.

The statute says that the guardian may be allowed "compensation" for his services out of the body of the estate if the ward have no available property out of which such payment can be directed by the court. In a series of decisions this court has announced in no uncertain terms what "compensation" as here used means.

It means a reasonable charge, not measured by the high salaries or rewards for services which large establishments and wealthy clients may voluntarily pay to lawyers of their choice, but measured more nearly by the compensation which the law allows to public officers having similar duties. The reason is that guardians *ad litem* are in a true sense public officers, and not merely that but public officers of *justice*. The cases laying down this general doctrine are *Speiser v. Merchants' Exch. Bank,* 110 Wis. 506, 86 N. W. 243; *Richardson v. Tyson,* 110 Wis. 572, 86 N. W. 250; *Will of McNaughton,* 138 Wis. 179, 118 N. W. 997, 120 N. W. 288. We do not deem it necessary to quote from these cases or state again the

principles upon which they rest. The cases speak for themselves and express the present position of the court as fully as though it were stated over again.

We would not be understood as minimizing in any respect the ability and industry of the gentlemen who have faithfully represented their infant wards in the present litigation. The interests involved were very large, the questions were numerous, and the time necessarily consumed in the various trials and in preparation has been considerable. The circuit court found that Mr. Van Valkenburgh had spent fifty-eight days in the circuit court, two and one-half days in county court, and one hundred and thirty-five days out of court in performing his duty as guardian; Mr. Pratt, twenty-four days in court and one day out of court; Mr. Charles A. Vilas, three days in court and two days out of court; Mr. Harper, thirty-two days in court and five days out of court; Mr. Goff, thirty days in court and six days out of court; Mr. W. D. Van Dyke, five days in court and ten days out of court; Mr. G. D. Van Dyke, twenty-four days in court; Mr. F. H. Bottum, three days in court and four days out of court. Granting all this to be true, and granting also that many of these gentlemen could easily have earned much larger sums if they had spent their time in the regular practice of their profession, we are still forced to the conclusion that the compensation has not been awarded upon the true basis, namely, the amount which the law would allow to public officers having similar duties. We regard these sums as too large under the principle which has been applied by this court in the cases cited.

The work is primarily and chiefly the performance of a duty imposed by the court upon one of its own officers to aid it in the administration of the law, and only incidentally is it the performance of work for a pecuniary compensation. The compensation which is deemed sufficient for somewhat similar services by the lawmaking power is exemplified by the sums allowed to bar examiners, viz. $10 per day, to counsel ap-

pointed to defend indigent defendants, viz. $15 per day in court and $10 per day out of court, and to divorce counsel, viz. $10 per day. In the case of the bar examiners, from two to three months of hard work are expended every year by a number of active and able members of the bar simply because they know that they are discharging a duty imposed by this court, and not because they receive anywhere near what their services would bring them in the field of private clientage.

Roughly speaking, it seems that the trial court allowed $33 per day for days spent in court and $17.50 per day for days spent out of court.

Without enlarging further upon the subject, we shall simply state our conclusion that the sums allowed are too large by nearly or quite fifty per cent. and must be reduced to the following amounts: F. B. Van Valkenburgh (including expenditures), $2,179.75; J. M. W. Pratt, $400; Charles A. Vilas, $70; John F. Harper, $600; Guy D. Goff, $550; W. D. Van Dyke, $170; G. D. Van Dyke, $400; and F. H. Bottum, $85.

Complaint is made as to the costs allowed to *Mr. Norris* in the circuit court, but it is not considered that the decision of the circuit court in this regard should be changed.

By the Court.—Judgment modified as indicated in this opinion and as so modified affirmed, the costs of printing the case and the fees of the clerk of this court to be taxed and paid out of the estate. Each guardian *ad litem* who filed a brief in this court is allowed $150 as compensation, and the cost of printing his brief, to be paid from the body of the estate. No other costs are allowed.

Motions for a rehearing made on behalf of the appellant *Daniel Wells Norris* and by *Frank B. Van Valkenburgh,* guardian *ad litem* for certain infants, were denied on March 17, 1914, with $25 costs to be taxed in favor of the executors and against the appellant *Norris.*

HOLLENBECK, Appellant, vs. CHIPPEWA SUGAR COMPANY and another, Respondents.

December 9, 1913—March 17, 1914.

Master and servant: Injury: Negligence: Unsafe working place: Railroads: Moving cars without warning: Contributory negligence: Questions for jury: Appeal: Directing judgment below.

1. An employee of a sugar company, engaged near the middle of a shed 400 feet long in unloading beets from cars which were pushed in, at intervals varying from twenty minutes to an hour or more, upon a track laid in an alley or space so narrow that a man could not stand between a car and the bins on either side, was required, after a car had been unloaded, to descend to the ground in such alley and shovel into the bins the beets which had fallen down in the course of unloading. There was no rule of the company for giving warning of the approach of cars, and no ladders or other means were provided by which the employee could climb upon the bins and escape. *Held*, that proof of these facts was sufficient to support the finding of a jury that the company was negligent in failing to provide a reasonably safe place to work.
2. Evidence that the employees of the railway company engaged in moving loaded cars upon such track had no lookout upon a car which was being pushed in ahead of the engine at the rate of six or eight miles per hour, and gave no warning of its approach to the employees of the sugar company working upon the track, was sufficient to sustain a finding of actionable negligence against such railway company.
3. An employee of the sugar company who, while working upon such track, was injured by a car pushed in without warning, was not guilty of contributory negligence as a matter of law, although he was working with his back to the direction from which the cars came, had not looked for cars for five minutes or more before the injury, and did not hear the ringing of the engine bell,—there being evidence that he was necessarily working in haste and, because he was a right-handed shoveler, was obliged to face the way he did, that he had been told that another car would not be pushed in for twenty minutes and if it should come sooner he would be notified, that he relied upon being so notified, as he had been on former occasions and as was customary, and that there was much noise from trains and other sources near by. Under such circumstances the question of contributory negligence was for the jury.

4. Where, in an action for personal injuries, plaintiff was entitled to judgment upon the verdict as rendered, and the trial court erroneously changed an answer of the special verdict so as to charge him with contributory negligence, the judgment should be reversed upon appeal and the cause remanded with directions to reinstate the answer of the jury and enter the judgment which should be entered.

APPEAL from a judgment of the circuit court for Chippewa county: JAMES WICKHAM, Circuit Judge. *Reversed.*

Action for personal injuries. The negligence alleged is in effect that the defendant *Chippewa Sugar Company* failed to furnish plaintiff a reasonably safe place to work and failed to promulgate rules for the warning of men working upon the tracks where cars were being shunted in. The alleged negligence on the part of the railway company is failure to keep a lookout when moving cars, and failure to give warning of the movements of cars.

A special verdict was returned as follows:

"(1) Did the defendant *Chippewa Sugar Company* fail to furnish the plaintiff with a reasonably safe place in which to perform his work? *A.* Yes.

"(2) If you answer question 1 'Yes,' then did the said defendant *Chippewa Sugar Company* fail to exercise ordinary care in failing to furnish the plaintiff with a reasonably safe place in which to perform his work? *A.* Yes.

"(3) If you answer question No. 2 'Yes,' then was said failure of the said defendant *Sugar Company* to exercise ordinary care the proximate cause of the plaintiff's injury? *A.* Yes.

"(4) During all the time that plaintiff was working in the beet shed and prior to the occasion of his injury, whenever the servants of the defendant railway company were about to move the train of cars into the alley in said shed where men were picking up beets, did there exist on the part of the railway employees a custom always to notify said men so working in said alley of the approach of said cars? *A.* Yes.

"(5) Did James Hedrington inform the plaintiff, before the time when the plaintiff was injured, that said railway

company's servants always followed the custom mentioned in question No. 4? *A.* Yes.

"(5½) If you answer question No. 5 'Yes,' did plaintiff, up to the time of his injury, rely upon said information and believe it to be true? *A.* Yes.

"(6) Did the defendant *Sugar Company,* prior to the time the plaintiff was injured, fail to provide and put into practice any rule for giving warning to persons who were at work in the alleys picking up beets, of the approach of trains of cars whenever such cars were about to be moved into said alleys where said persons were working? *A.* Yes.

"(7) If you answer question No. 6 'Yes,' then did the defendant *Sugar Company* fail to exercise ordinary care in failing to provide and put into practice such rule for warning such persons of the approach of said train? *A.* Yes.

"(8) If you answer question No. 7 'Yes,' then was such failure of the defendant *Sugar Company* to exercise ordinary care the proximate cause of the plaintiff's injury? *A.* Yes.

"(9) When the servants of the railway company moved the train of cars into the alley where the plaintiff was working, just before the time of his injury, did said servants who had charge of said train fail to give reasonable warning to all persons who might be in said alley of the approach of said train? *A.* Yes.

"(10) If you answer question No. 9 'Yes,' then did said railway servants fail to exercise ordinary care in failing to give such warning? *A.* Yes.

"(11) If you answer question No. 10 'Yes,' then was such failure of said railway servants to exercise ordinary care in failing to give such warning the proximate cause of plaintiff's injury? *A.* Yes.

"(12) Did said railway servants, who had charge of the movement of the cars just before the time of the plaintiff's injury, all fail to keep a reasonable lookout in the direction in which said cars were moving to prevent injury to persons who might be on and near the railway tracks? *A.* Yes.

"(13) If you answer question No. 12 'Yes,' then did such railway servants fail to exercise ordinary care in failing to keep such lookout? *A.* Yes.

"(14) If you answer question No. 13 'Yes,' then was said failure of said railway servants to exercise ordinary care in

failing to keep such lookout the proximate cause of the plaintiff's injury? *A.* Yes.

"(15) Was the danger of the plaintiff getting injured by the cars while working in the alley under the conditions as they existed, such that the plaintiff by the exercise of ordinary care should have known and appreciated such danger before the time of his injury? *A.* No.

"(16) Did any want of ordinary care on the part of the plaintiff proximately contribute to his injury? *A.* No.

"(17) If the court should determine that the plaintiff is entitled to judgment on this verdict, then at what sum do you assess the plaintiff's damages? *A.* $7,500."

On motions made after verdict the court changed the answer to the sixteenth question from "No" to "Yes" and found plaintiff guilty of contributory negligence, and ordered judgment dismissing the complaint. Judgment was entered accordingly, from which this appeal was taken.

W. H. Frawley and *T. F. Frawley,* for the appellant, upon the question of contributory negligence, cited, among other authorities, Bailey, Pers. Inj. sec. 1433; 3 Labatt, Mast. & Serv. (2d ed.) sec. 1266; 3 Elliott, Railroads (2d ed.) §§ 1265*d*, 1315*c*; *St. Louis, I. M. & S. R. Co. v. Jackson,* 78 Ark. 100, 93 S. W. 746; *Egan v. Southern P. Co.* 15 Cal. App. 766, 115 Pac. 939; *St. Louis, A. & T. H. R. Co. v. Eggmann,* 161 Ill. 155, 43 N. E. 620; *Shoner v. Pennsylvania Co.* 130 Ind. 170, 28 N. E. 616, 29 N. E. 775; *Baltimore & O. S. W. R. Co. v. Peterson,* 156 Ind. 364, 59 N. E. 1044; *Pittsburgh, C., C. & St. L. R. Co. v. Rogers,* 45 Ind. App. 230, 87 N. E. 28; *Crowley v. B., C. R. & N. R. Co.* 65 Iowa, 658, 20 N. W. 467, 22 N. W. 918; *Comstock v. U. P. R. Co.* 56 Kan. 228, 42 Pac. 724; *Dowell v. C., R. I. & P. R. Co.* 83 Kan. 562, 112 Pac. 136; *Pittsburgh, C., C. & St. L. R. Co. v. Schaub,* 136 Ky. 652, 124 S. W. 885; *Heaney v. Boston E. R. Co.* 211 Mass. 467, 98 N. E. 89; *Cornell v. G. N. R. Co.* 112 Minn. 341, 128 N. W. 22; *Schoen v. C., St. P., M. & O. R. Co.* 112 Minn. 38, 127 N. W. 433; *Albanese v.*

C. R. Co. 70 N. J. Law, 241, 57 Atl. 447; *Mullin v. C. R. Co.* 77 N. J. Law, 241, 72 Atl. 426; *Schultz v. C. & N. W. R. Co.* 44 Wis. 638; *Ditberner v. C., M. & St. P. R. Co.* 47 Wis. 138, 2 N. W. 69; *Promer v. M., L. S. & W. R. Co.* 90 Wis. 215, 63 N. W. 90; *Bain v. N. P. R. Co.* 120 Wis. 412, 98 N. W. 241; *Turtenwald v. Wis. Lakes I. & C. Co.* 121 Wis. 65, 98 N. W. 948; *Sparks v. Wis. Cent. R. Co.* 139 Wis. 108, 120 N. W. 858; *Hendrickson v. Wis. Cent. R. Co.* 143 Wis. 179, 122 N. W. 758, 126 N. W. 686; *McHolm v. Philadelphia & R. C. & I. Co.* 147 Wis. 381, 132 N. W. 585; *Collins v. C. & N. W. R. Co.* 150 Wis. 305, 136 N. W. 628; *Slam v. L. S. T. & T. R. Co.* 152 Wis. 426, 140 N. W. 30; *Gray v. C. & N. W. R. Co.* 153 Wis. 637, 142 N. W. 505.

For the respondent *Chippewa Sugar Company* there was a brief by *W. H. Stafford,* attorney, and *T. J. Connor,* of counsel, and oral argument by *Mr. Stafford.* They cited, *inter alia, Goodrich v. Chippewa Valley E. R. Co.* 108 Wis. 329, 84 N. W. 419; *McCadden v. Abbot,* 92 Wis. 551, 66 N. W. 694; *Guhl v. Whitcomb,* 109 Wis. 69, 85 N. W. 142; *Aerkfetz v. Humphreys,* 145 U. S. 418, 12 Sup. Ct. 835; *Keefe v. C. & N. W. R. Co.* 92 Iowa, 182, 60 N. W. 503; *Tomko v. C. R. Co.* 1 App. Div. 289, 37 N. Y. Supp. 144; *Grand Trunk R. Co. v. Baird,* 94 Fed. 946; *Carlson v. C. S. & M. R. Co.* 120 Mich. 481, 79 N. W. 688; *Daly v. Detroit City St. R. Co.* 105 Mich. 193, 63 N. W. 73; *Schmolze v. C., M. & St. P. R. Co.* 83 Wis. 659, 53 N. W. 743, 54 N. W. 106; *Sours v. G. N. R. Co.* 88 Minn. 504, 93 N. W. 517; *Lynch v. B. & A. R. Co.* 159 Mass. 536, 34 N. E. 1072.

For the respondent *Minneapolis, St. Paul & Sault Ste. Marie Railway Company* there was a brief by *W. A. Hayes,* attorney, and *John L. Erdall,* of counsel, and oral argument by *Mr. Hayes.* They cited the following additional cases: *Rothe v. M. & St. P. R. Co.* 21 Wis. 256; *Lofdahl v. M., St. P. & S. S. M. R. Co.* 88 Wis. 421, 60 N. W. 795; *Wilber v.*

Wis. Cent. R. Co. 86 Wis. 535, 57 N. W. 356; *Schlimgen v. C., M. & St. P. R. Co.* 90 Wis. 186, 62 N. W. 1045; *Nolan v. M., L. S. & W. R. Co.* 91 Wis. 16, 64 N. W. 319; *Hanson v. C. V. & N. R. Co.* 150 Wis. 104, 135 N. W. 488; *Montague v. C., M. & St. P. R. Co.* 82 Fed. 787; *Chicago & W. I. R. Co. v. Reichert,* 69 Ill. App. 91; *Spaven v. L. S. & M. S. R. Co.* 130 Mich. 579, 90 N. W. 325.

The following opinion was filed January 13, 1914:

KERWIN, J. The alleged contributory negligence of the plaintiff is the main question in the case, although counsel for respondents argue that no negligence on the part of defendants was shown. The jury found negligence on the part of both defendants and the court below did not disturb such findings.

A careful examination of the evidence convinces us that the findings of negligence are well supported by the evidence. Counsel for defendant *Chippewa Sugar Company* contends that the place where plaintiff was working was safe. It appears that the shed where the beets were being stored was about 400 feet long and between 100 and 133 feet wide, with three alleys running through it lengthwise occupied by railway tracks, the middle alley being the one where plaintiff was at work when injured. The duties of the plaintiff and several others were to unload cars as they were shoved in upon these tracks. In unloading, beets would fall beside the cars, and when the cars were switched out the men engaged in unloading would shovel the beets which were upon the ground into the bin. The work of unloading was done in great haste, the men being paid by the ton and having to work rapidly in order to keep the unloading done as fast as the cars came in. The alleys in the sheds through which the tracks were laid were narrow, there being not sufficient room in some places between the side of the car and bin for a man to safely stand, so it was necessary for the men shoveling beets into the bin to

get out of the way when a car was being shoved in. The sides of the bins were between six and eight feet high, and no provision was made by ladders or otherwise for climbing out of the alley upon the bins. When the car was shoved in, the men on the ground shoveling beets into the bin, when they had notice of its coming, would go out of the alley. In the instant case there is evidence that the car came into the alley at the rate of six or eight miles per hour, and that plaintiff did not see it in time to get out of the way, and was crushed between the side of the bin and the car; that cars were pushed in at intervals varying from twenty minutes to an hour or more, and plaintiff relied upon being notified of the approach of cars; that he was on the north side of the alley, with his back to the east, shoveling beets from the ground into the bin; that when the car came upon him he did not have time to get out at the west and tried to climb upon the bin, but, owing to there being no ladder or other appliance to aid in ascending, he failed and was caught and injured. The injury occurred November 8, 1911. It is clear from the evidence that the jury was well warranted in finding that the defendant *Chippewa Sugar Company* failed to furnish a safe place for plaintiff to work. *Sparrow v. Menasha P. Co.* 154 Wis. 459, 143 N. W. 317.

It is also clear that the findings charging the defendant *Minneapolis, St. Paul & Sault Ste. Marie Railway Company* with negligence are well supported by the evidence. There is abundance of evidence that the defendant railway company, while operating its cars and backing the car that struck and injured plaintiff, failed to keep a lookout and failed to give warning of the movements of the car. The evidence and findings, therefore, established actionable negligence on the part of the defendant *Minneapolis, St. Paul & Sault Ste. Marie Railway Company. Slam v. Lake Superior T. & T. R. Co.* 152 Wis. 426, 140 N. W. 30; *Collins v. C. & N. W. R. Co.* 150 Wis. 305, 136 N. W. 628; *Hendrickson v. Wis. Cent.*

R. Co. 143 Wis. 179, 122 N. W. 758, 126 N. W. 686; *Landry v. G. N. R. Co.* 152 Wis. 379, 140 N. W. 75; *Rowley v. C., M. & St. P. R. Co.* 135 Wis. 208, 115 N. W. 865.

The alleged contributory negligence of plaintiff is the only serious question in the case. The jury found that plaintiff was not guilty of any negligence contributing to his injury and the court below changed the answer of the jury. We are of opinion, after a careful examination of the evidence, that the court below was in error in disturbing the finding of the jury upon the question of contributory negligence. It is strenuously contended by counsel for both defendants that the plaintiff was guilty of contributory negligence as matter of law in not looking out for his own safety and observing the car as it was pushed in and escaping before it struck him. It is argued that had he watched for the car he could have seen it in time to have escaped through the alley to the west or climbed upon the bin and thus have avoided injury; that the bell was ringing, and had the plaintiff been in the exercise of ordinary care he would have heard the car approaching and heard the bell ringing. On the other hand, the evidence tends to show that the plaintiff was near the middle of the shed, with his face to the west, shoveling beets into the bin; that he faced the west because he was a right-hand shoveler, therefore had to face the west as he stood on the north side of the alley; that there was considerable noise caused by several men engaged in throwing frozen beets into the bins; that he was shoveling only about five minutes at this particular place when the car struck him, and he was told by the foreman that the car would not come in for about twenty minutes, and was working in great haste in order to get the beets in the alley into the bin; that notice had been given him on former occasions of the approach of the cars, and when he began shoveling beets no car was in sight; that cars were shoved into the three alleys from the east end ahead of the engine, and it was customary to have a man on the car who would notify the men

putting beets into the bins to get out of the way. The cars varied in width, the wide cars coming close to the bins, at places from four to six inches from the bin; at other places from eight to twelve inches from the bin. It was the duty of the plaintiff to pick up the beets as soon as the car was pulled out, and he was doing so when injured. The evidence further shows that plaintiff kept on working and did not look for the car because he was told a car would not be pushed in for twenty minutes, and if it should come sooner the foreman told him he would be notified of its approach; that he did not see the car until it was passing by him, and then he saw the big car and tried to throw himself over the bin and failed and was struck by the car, and that he did not have time to get out at the west end ahead of the car because the cars were going too fast and because of obstructions in the alley; that in backing in cars before the time in question, notice had been given to plaintiff that cars were coming, but no notice was given at the time of injury; that no lookout was kept and no warning given; that there was so much noise around the sheds, the main line of the railway company and its yards being only a very short distance therefrom and trains almost constantly in motion there, that it was difficult to tell, when a bell was ringing, just where the train was.

We shall not further extend this opinion by recital of evidence. We think the question of contributory negligence was for the jury. It will also be observed that the court below changed only the answer to the sixteenth question of the special verdict, leaving the other questions unchanged. By the other questions the jury found that there existed a custom on the part of the employees of the defendant railway company to notify men working in the alleys of the approach of cars, and that the plaintiff was notified that the railway company always followed such custom, and that up to the time of the injury plaintiff relied upon such custom.

Counsel for respondents lay great stress upon the fact that

plaintiff admitted that at other times he looked for cars, but that at the time in question and for five minutes or more before the injury he did not look at all. Whether under the circumstances of the case it was contributory negligence to fail to look for five minutes before the injury when the plaintiff was working in haste, and whether he had a right to rely upon notice being given and that the car would not come in for twenty minutes, were proper for the consideration of the jury. *Gray v. C. & N. W. R. Co.* 153 Wis. 637, 142 N. W. 505; *Turtenwald v. Wis. Lakes I. & C. Co.* 121 Wis. 65, 98 N. W. 948; *Jakopac v. Newport M. Co.* 153 Wis. 176, 140 N. W. 1060; *Novitski v. Waite G. C. Co.* 153 Wis. 266, 140 N. W. 1064; *Holloway v. H. W. Johns-Manville Co.* 135 Wis. 629, 116 N. W. 635.

We think the question of contributory negligence was for the jury. *Collins v. C. & N. W. R. Co.* 150 Wis. 305, 136 N. W. 628; *Slam v. Lake Superior T. & T. R. Co.* 152 Wis. 426, 140 N. W. 30; *Ditberner v. C., M. & St. P. R. Co.* 47 Wis. 138, 2 N. W. 69; *Johnson v. Lake Superior T. & T. Co.* 86 Wis. 64, 56 N. W. 161; *Bain v. N. P. R. Co.* 120 Wis. 412, 98 N. W. 241; *Hendrickson v. Wis. Cent. R. Co.* 143 Wis. 179, 122 N. W. 758, 126 N. W. 686; *McHolm v. Philadelphia & R. C. & I. Co.* 147 Wis. 381, 132 N. W. 585.

The plaintiff was entitled to judgment upon the verdict as returned by the jury. The answer of the jury to the sixteenth question should therefore be reinstated and judgment entered for plaintiff. *Monahan v. Fairbanks-Morse Mfg. Co.* 147 Wis. 104, 132 N. W. 983.

By the Court.—The judgment of the court below is reversed, and the cause remanded with instructions to reinstate the answer of the jury to the sixteenth question of the special verdict and enter judgment in favor of the plaintiff upon the verdict of the jury.

The respondent *Chippewa Sugar Company* moved for a re-

hearing, and the respondent *Minneapolis, St. Paul & Sault Ste. Marie Railway Company* moved for a modification of the mandate or a rehearing.

For the respondent *Sugar Company* there were briefs by *W. H. Stafford,* attorney, and *T. J. Connor,* of counsel.

For the respondent *Railway Company* there was a brief by *W. A. Hayes,* attorney, and *A. H. Bright, John L. Erdall, T. M. Holland, W. E. Fisher,* and *John F. Kluwin,* of counsel.

Both motions were denied, with $25 costs in each case, on March 17, 1914.

Ross, Respondent, vs. NORTHRUP, KING & Co., Appellant.

December 12, 1913—March 17, 1914.

Sales: Warranty: Seeds: Printed refusal to warrant: Notice: Principal and agent: When relation exists: Rights of undisclosed principal: Customs and usages: General trade custom, when binding.

1. The fact that a wholesale seed house advertised its seeds in various papers and invited intending purchasers to write for its catalogue and send name of their local dealer, stating that it sold its seeds to retail dealers from whom they might be purchased, is not sufficient to show that a retail dealer who ordered tobacco seed from it at the request of a customer was its agent.
2. Assuming that in ordering seed for a customer a retail merchant acted as the agent of the customer, the undisclosed principal would have no greater rights against the seedsman than such agent would have had if he had purchased for himself.
3. Leaving custom out of consideration, where a certain variety of seed is called for and seed is furnished in response to such call, there is a warranty that it is true to description unless the seller advises the purchaser that the sale is made without warranty.
4. Where to the knowledge of the seedsman seed was ordered from his printed catalogue, and upon the first page of such catalogue, also at the top of the blank order sheet therein and upon one side of the shipping tag attached to the package of seeds,

was conspicuously printed a positive refusal to warrant any seeds as to description, quality, productiveness, or any other matter, or to be in any way responsible for the crop, there was no warranty of the genuineness or productiveness of the seed.

5. In such case, where the seed was ordered by a retail merchant as agent for another, notice to such merchant that the seed was not warranted was notice to his principal; and such would be the effect of notice printed on the invoice, though received after the seed had been delivered to the principal, if the agent might reasonably have notified him before the seed was used.
6. The principal could not escape the effect of such notice by showing that the agent paid no attention to and failed to observe what was so plainly called to his attention.
7. A general trade custom among wholesale seedsmen not to warrant seeds is binding upon a retail dealer purchasing from one of them, although such purchaser may be ignorant of it.
8. The rules of law applicable to a general custom are different from those applicable to a local custom.
9. In an action to recover for breach of an implied warranty of farm seeds, a general trade custom not to warrant being shown, it was immaterial that defendant had previously sent to plaintiff's agent a cabinet containing packages of garden seeds with no disclaimer printed on such packages, at least unless defendant knew that the latter was ignorant of such custom.

APPEAL from a judgment of the circuit court for Vernon county: E. C. HIGBEE, Circuit Judge. *Reversed.*

The defendant is a wholesale dealer in garden and field seeds. It advertised its seeds quite extensively, such advertisements suggesting to prospective purchasers of seeds that they send for defendant's catalogue and also advise it of the name of the prospective purchaser's local dealer. The plaintiff is a farmer who in the spring of 1911 was intending to plant about twenty acres of tobacco. He saw one of defendant's catalogues in which was advertised "Comstock Spanish Tobacco Seed." He desired to raise the variety of tobacco produced from this seed and called on three local dealers in Viroqua in the spring of 1911 to purchase the same. None of these dealers had any of this seed in stock, so he called on a fourth dealer, one Morton, who also advised him that he did not have any of this seed on hand. The plaintiff then stated

that he would himself order the seed from the defendant. Morton then informed him that he was handling some seeds of the defendant and would send and get the tobacco seed for him, and it was finally arranged between them that Morton should order one pound of this variety of tobacco seed. The order was dated on March 27th. When the order was received, the defendant did not have any of this particular variety of seed on hand and sent to Virginia for it. This order apparently was promptly filled, except that the tobacco seed which was sent in response thereto was not Comstock Spanish tobacco seed. It was not possible to tell from an examination of the seed itself that it was not of the variety ordered. The defendant shipped this seed to Morton on April 8, 1911, who thereafter notified the plaintiff of its arrival. The seed was taken by the plaintiff and planted by him and proved to be an inferior variety of tobacco, or one which was not adapted to the soil in which it was planted. The defendant did not know of the circumstances under which the seed was ordered and so sold the same to Morton in the ordinary course of business. Plaintiff brought action against the defendant to recover damages for breach of warranty. Other facts essential to an understanding of the issues in the case will be found in the opinion. The jury returned the following special verdict:

"(1) Was the sale of the package of tobacco seed in question sold by the defendants to the plaintiff? *A.* Yes.

"(2) Was there at the time of said sale a general custom in the Northwest, including Wisconsin, among seedsmen such as the defendants, to refuse to warrant seeds? *A.* Yes.

"(3) If you answer question 2 'Yes,' then did the plaintiff have knowledge of the same at the time he purchased said seed? *A.* No.

"(4) Was there a disclaimer printed upon the bag in which the seed was delivered to the plaintiff? *A.* No.

"(5) Was the seed in question 'Comstock Spanish' tobacco seed? *A.* No.

"(6) Did the plaintiff at or before the time of purchase of

the seed in question have knowledge or information of the disclaimer printed in the defendant's catalogue or upon any of its literature or packages? *A.* No.

"(7) If you answer question 5 'No,' then what would have been the reasonable and probable value of plaintiff's 1911 crop had the seed in question been Comstock Spanish tobacco seed? *A.* $2,000.

"(8) What was the reasonable value of plaintiff's 1911 crop as raised? *A.* $985."

Judgment was entered on this verdict in favor of the plaintiff, and defendant appeals therefrom.

For the appellant there was a brief by *C. W. Graves* and *H. P. Proctor,* and oral argument by *Mr. Graves.* They argued, *inter alia,* that defendant was not liable to plaintiff because there was no privity of contract between them. 7 Am. & Eng. Ency. of Law (2d ed.) 104; *Woods v. Ayres,* 39 Mich. 345; 1 Harvard Law Rev. 226; *Lawrence v. Fox,* 20 N. Y. 268; *Mellen v. Whipple,* 1 Gray, 317; 44 Cent. L. J. 93; *Davidson v. Nichols,* 11 Allen, 517; *Roddy v. M. P. R. Co.* 104 Mo. 234, 15 S. W. 1112; *Thomas v. Winchester,* 6 N. Y. 377; *Ware v. Brown,* 2 Bond, 267; *Ferris v. Carson W. Co.* 16 Nev. 44, 40 Am. Rep. 405; *Fowler v. Athens W. W. Co.* 83 Ga. 219, 9 S. E. 673; *Becker v. Keokuk W. W.* 79 Iowa, 419, 44 N. W. 694, 18 Am. St. Rep. 377; *Phœnix Ins. Co. v. Trenton W. Co.* 42 Mo. App. 118; *Necker v. Harvey,* 49 Mich. 517, 14 N. W. 503; *Hasbrouck v. Armour & Co.* 139 Wis. 357, 121 N. W. 157; Williston, Sales, § 244; *Nelson v. Armour P. Co.* 76 Ark. 352, 90 S. W. 288; *Smith v. Williams,* 117 Ga. 782, 45 S. E. 394; *Prater v. Campbell,* 110 Ky. 23, 60 S. W. 918; *Lebourdais v. Vitrified W. Co.* 194 Mass. 341, 80 N. E. 382; *Tomlinson v. Armour & Co.* 74 N. J. Law, 274, 65 Atl. 883; 2 Mechem, Sales, § 1834; *Dukes v. Nelson,* 27 Ga. 457; *Farrell v. Manhattan M. Co.* 198 Mass. 271, 84 N. E. 481; *Nixa C. Co. v. Lehmann-Higginson Co.* 70 Kan. 664, 79 Pac. 141. Plaintiff was bound

by the general custom of seedsmen not to warrant seeds. *Leonard S. Co. v. Crary C. Co.* 147 Wis. 166, 132 N. W. 902; *Blizzard Bros. v. Growers' C. Co.* 152 Iowa, 257, 132 N. W. 66; *Hewitt v. John Week L. Co.* 77 Wis. 548, 46 N. W. 822; *Shores L. Co. v. Stitt,* 102 Wis. 450, 78 N. W. 562; *Gehl v. Milwaukee P. Co.* 105 Wis. 573, 580, 81 N. W. 666; *Mooney v. Howard Ins. Co.* 138 Mass. 375; *Smith v. Clews,* 114 N. Y. 190, 21 N. E. 160; *Taylor v. Bailey,* 169 Ill. 181, 48 N. E. 200; *Austrian v. Springer,* 94 Mich. 343, 54 N. W. 50. Defendant was not liable upon an implied warranty, not being a grower or producer of the seed. 55 Cent. L. J. 465; *Shisler v. Baxter,* 109 Pa. St. 443; *Lovegrove v. Fisher,* 2 Fost. & Fin. 128; *Lord v. Grow,* 39 Pa. St. 88, 80 Am. Dec. 504; *Kircher v. Conrad,* 9 Mont. 191, 23 Pac. 74, 7 L. R. A. 471; *Calhoon v. Brinker,* 17 Ohio Dec. N. P. 705.

For the respondent there was a brief by *Bunge & Bosshard,* and oral argument by *George W. Bunge.* They cited, among other cases, *Hoffman v. Dixon,* 105 Wis. 315, 81 N. W. 491; *Fuhrman v. Interior W. Co.* 64 Wash. 159, 116 Pac. 666, 37 L. R. A. N. S. 89; *Leonard S. Co. v. Crary C. Co.* 147 Wis. 166, 132 N. W. 902, 37 L. R. A. N. S. 79; *Vaughan's S. Store v. Stringfellow,* 56 Fla. 708, 48 South. 417.

The following opinion was filed January 13, 1914:

BARNES, J. The appellant argues at length that the relation of buyer and seller existed between the defendant and the storekeeper, Morton, and also between the plaintiff and Morton, and that there was no privity of contract between the plaintiff and the defendant, and, there being no contract relation between them, there was no contract to breach and of course no right of action for a breach.

The respondent contends (1) that Morton acted as the agent of both parties to the transaction, and, (2) if this be not so, that he acted as the agent of the plaintiff, and that

plaintiff as an undisclosed principal has the same right of action against the defendant that Morton would have had, had he himself planted the seed.

The facts relied on by the plaintiff to show that Morton acted as the agent of the defendant in the transaction are wholly inadequate to show that the relation of principal and agent existed between those parties. The defendant advertised its seeds in the Wisconsin Agriculturist and other papers. Such advertisements requested prospective purchasers to send for its catalogue. A blank coupon to be used in ordering the catalogue was included in the advertisement. In the coupon there was a blank space in which was to be inserted the "local dealer's name," and in the advertisement proper this sentence was used: "Use the coupon or write us a postal, giving the name of your dealer, and sign at the bottom of the card with your own name." The language used advised the prospective purchaser that defendant sold its seeds to retail dealers from whom they might be purchased by those desiring to plant them. We think it is too plain to warrant discussion that this advertisement did not make every retail dealer in seeds in the United States the agent of the defendant. Inasmuch as the plaintiff must contend, in order to recover, that the storekeeper acted as his agent, it is not very material for the purposes of the case whether or not it be said that he also acted as the agent of the defendant, because we think the same result would follow in either case.

In disposing of the case we will assume that the evidence was sufficient to warrant a court or jury in finding that the relation of buyer and seller did not exist between the plaintiff and Morton and that Morton acted as the agent of the plaintiff, an undisclosed principal, in ordering the goods. This is the most favorable view for the plaintiff that the evidence will warrant.

It is apparent that the material question in the case is whether the tobacco seed was sold to Morton with or without

a warranty that it was true to description. Defendant knew nothing of the plaintiff in the transaction. Plaintiff's rights against the defendant are no greater than Morton's would be if he had been the real instead of the ostensible principal. This is frankly conceded by respondent in the brief filed, and advisedly so.

Leaving any question of custom out of consideration, where a certain variety of seed is called for and seed is furnished in response to such call, there is a warranty that it is true to description unless the seller advises the purchaser that the sale is made without warranty. *Hoffman v. Dixon,* 105 Wis. 315, 81 N. W. 491. There is no doubt that the vendor may sell without warranty. *Leonard S. Co. v. Crary C. Co.* 147 Wis. 166, 132 N. W. 902. Were the goods so sold to Morton? He had the defendant's catalogue before him when he placed the order and ordered from it. He so testifies. The defendant knew that he ordered from the catalogue, because one of the two items called for was ordered by the catalogue number. Between the cover and the first page of the catalogue there was a blank order sheet for customers to detach and use in ordering seeds. Immediately above the blank spaces in which the order was to be written was a printed statement to the effect that defendant gave "no warranty, express or implied, as to description, quality, productiveness, or any other matter of any seeds . . . they send out, and will not be in any way responsible for the crop."

On the first page of the catalogue proper there was printed in large type the words *"General suggestions to customers."* There were a dozen such suggestions made, the first word or words in each instance, indicating the nature of the suggestion, being printed in large, heavy type. One of these headings consisted of the word *"Disclaimer"* so printed, and immediately following it was a statement substantially like the one quoted above.

The two packages ordered from the defendant were

wrapped in one bundle and shipped by express. One side of the shipping tag contained the name and address of the consignee. On the reverse side there was printed in red ink and in conspicuous type the following words, which were underscored as indicated:

"*Northrup, King & Co. do not give, and their agents are forbidden to give, any warranty, express or implied,* as to description, quality, productiveness, or any other matter of any seeds, bulbs or plants they send out, and will not be in any way responsible for the crop. If the purchaser does not accept the goods on these terms, they are at once to be returned and money paid for same will be promptly refunded."

The goods were shipped on April 8th and were followed by an invoice two days later. There was printed near the head of the invoice a statement like that contained in the catalogue to the effect that the goods were sold without warranty. In reference to this invoice the respondent claims that it was not received until after the seed had actually been delivered to the plaintiff. There is some testimony given by Morton to the effect that the invoice was not received until the day after the seed was delivered and some testimony which would indicate that the seed had not been delivered when the invoice came. We accept the statement that there had been an actual delivery before receipt of the invoice. But what of it? It is not claimed that any use had been made of the seed in the meantime. The relation of principal and agent existed between the plaintiff and Morton. The latter could communicate with the former by telephone; at least he testified that he telephoned plaintiff when the seed arrived. The invoice was retained without objection; so was the seed, and the seed was thereafter paid for in the usual course of business. Morton testified that he did not read or pay any attention to any of these nonwarranty provisions. If Morton had observed the conditions printed on the invoice it would certainly have been his duty to inform his principal of them.

The defendant having the right to sell without warranty,

it seems clear that it did all that could in reason be required of it to advise the purchaser of the condition upon which the seed was sold. Of course it is easy to imagine other things which it might have done which would be better calculated to give notice, but if those things had been done and had proved inefficacious, still other things might be suggested which would surely acquaint Morton with the conditions of sale. The business was transacted by mail. Where the book from which the order was given, the shipping tag, and the invoice, all stated these conditions, it would seem to be unreasonable to hold that any blame attached to the defendant if Morton failed to observe all of these things. The evidence is quite convincing to show that there was a disclaimer of warranty printed on the bag containing the tobacco seed also, but there was a sufficient conflict in the evidence on this point to make the question one for the jury, and it found that there was none.

Mr. Morton could not close his eyes to the information that was literally staring him in the face and then hold the defendant liable because he did so. In matters of contract one must observe what he has reasonable means of knowing. The law for the protection of persons even against fraud will not be extended to those who "having the means in their own hands neglect to protect themselves. . . . The law requires men, in their dealings with each other, to exercise proper vigilance, and apply their attention to those particulars which may be supposed to be within reach of their observation and judgment and not close their eyes to the means of information which are accessible to them." *Mamlock v. Fairbanks,* 46 Wis. 415, 417, 418, 1 N. W. 167; *Bostwick v. Mut. L. Ins. Co.* 116 Wis. 392, 400, 89 N. W. 538, 92 N. W. 246.

And where a purchaser is put upon inquiry as to the quality of the thing offered for sale, he is bound to know what is discoverable in regard thereto by the exercise of ordinary care, and he cannot "close his eyes to defects which are be-

fore him or to information which is at hand." *Warner v. Benjamin,* 89 Wis. 290, 62 N. W. 179.

In the absence of fraud "a man cannot relieve himself from the obligation of a written agreement by saying he did not read it when he signed it, or did not know what it contained." *Deering v. Hoeft,* 111 Wis. 339 (87 N. W. 298), and cases cited on page 343; *Steffen v. Supreme Assembly,* 130 Wis. 485, 487, 110 N. W. 401.

The presumption arises from the delivery and acceptance of a bill of lading that the party receiving it assented to its terms. Ignorance of its contents "arising from failure to read it or to make some reasonable effort to obtain information in that regard, in the absence of any evidence of fraud . . . or of the use of any means to deter the shipper from fully understanding the contract, is not sufficient to overcome it." *Schaller v. C. & N. W. R. Co.* 97 Wis. 31, 41, 71 N. W. 1042; *Ullman v. C. & N. W. R. Co.* 112 Wis. 150, 88 N. W. 41. Other cases of the same tenor are *Herbst v. Lowe,* 65 Wis. 316, 26 N. W. 751; *Farr v. Peterson,* 91 Wis. 182, 64 N. W. 863; *J. Thompson Mfg. Co. v. Gunderson,* 106 Wis. 449, 453, 82 N. W. 299; and *Ripley v. Page L. & I. Co.* 138 Wis. 304, 119 N. W. 108.

There is still another insurmountable difficulty in the way of plaintiff's recovery. The jury found that at the time of the sale there was "a general custom in the Northwest, including Wisconsin, among seedsmen such as the defendants, to refuse to warrant seeds." The jury also found that the plaintiff did not know of such custom. The jury made no such finding in reference to Morton. There is no evidence to show whether he knew of such custom or not. He did testify that he had no notice from any source that the defendant would not sell its seeds with a warranty. This might all be true and still the general custom such as the jury found might not only exist, but Morton might have knowledge of it. It is probable that, had he been asked the direct question, he

would have denied all knowledge of the custom, and we will assume that on the evidence referred to the court might have found lack of knowledge, and that it actually did so find.

It is not the law that ignorance of a general trade custom relieves a party from the effect of it. If there was a general custom among seedsmen such as was found, Morton as a retail dealer in seeds was bound to know of it.

"The object of proving a general custom is not to contradict or change a contract made between the parties, but to interpret it to the court and jury as it was understood by the parties at the time it was made; and this evidence of a general custom, when it does not contradict or change the express terms of the written contract, is admitted for the purpose of showing what the real contract between the parties was. . . . And, when it is clearly proven, the parties are supposed to have contracted with reference to such custom, unless such custom changes the express terms of the written contract." *Hewitt v. John Week L. Co.* 77 Wis. 548, 556, 46 N. W. 822, and cases cited.

"A uniform trade custom is readily accepted by courts to define what is ambiguous or is left indeterminate in a contract, where both parties have knowledge of the custom, or are so situated that such knowledge may be presumed, for the reason that the majority of such transactions are had in view of the custom, and the agreement on which the minds of the parties actually met will thereby be carried into effect. . . . Where the custom is proved to be known to both, it may even add terms to the contract. . . . Where the custom is *general,* it will be presumed to have entered into the contract, and one may be bound thereby although ignorant, unless the other party be shown to have knowledge of his ignorance." *Gehl v. Milwaukee P. Co.* 105 Wis. 573, 580, 81 N. W. 666.

Replying to the argument of counsel in another case, that a custom in order to be binding must be known to both parties to the contract, or it must have existed a sufficient length of time to raise a presumption of knowledge, the court said:

"That rule of course prevails in case of an attempt to annex to a contract some incident not expressed therein, as in the

case of *Hewitt v. John Week L. Co.* 77 Wis. 548, 46 N. W. 822, where the question was whether the owner of a sawmill, under his contract to saw logs by the thousand, was entitled to the slabs. There is a difference between evidence of usage to establish a custom for the purpose of annexing that as an incident to a contract, and the same kind of proof to show the meaning of some word or term used in a contract. In the latter situation the meaning of the term as understood at the time and place of the contract governs, whether both of the parties knew of such meaning or not. They are presumed to contract with reference to the meaning of words and terms used by them, as such words and terms are understood at the place of their contract." *Shores L. Co. v. Stitt,* 102 Wis. 450, 455, 78 N. W. 562.

The case at bar is in its facts very much like one recently decided by the supreme court of Iowa, from which we quote the following:

"The alleged liability of the Younkerman Seed Company may be considered first. The evidence that a general custom, such as pleaded, prevails in the seed trade was conclusive. The particular package had the printed matter thereon, and, though this may not have been noticed, the sale is presumed to have been negotiated with reference to the general custom of the trade. . . . This being so, a warranty that the seed was true to name could not be inferred, and the court rightly found in favor of the Younkerman Seed Company." *Blizzard Bros. v. Growers' C. Co.* 152 Iowa, 257, 132 N. W. 66, 67.

This case is cited with approval in *Leonard S. Co. v. Crary C. Co.* 147 Wis. 166, 132 N. W. 902, where the material facts in the *Blizzard Case* are set forth.

Speaking of a general custom pertaining to the manner in which mines were operated, the Iowa court in another case said:

"Again, it is said there is no showing that defendant had notice or knowledge of the custom. This is not necessary. The custom or usage being shown by competent evidence, the defendant is presumed to have had knowledge thereof. This

is fundamental." *Thayer v. Smoky Hollow C. Co.* 121 Iowa, 121, 127, 96 N. W. 718.

The rules of law applicable to a general custom should not be confounded with those applicable to a local custom. *John O'Brien L. Co. v. Wilkinson,* 123 Wis. 272, 101 N. W. 1050, and cases cited.

It is argued that the evidence was not sufficient to warrant the finding of a general custom. We think it was.

The conclusions which follow from the foregoing discussion may be summarized as follows: (1) The defendant offered the tobacco seed in question for sale without a warranty, as it had the right to do, and adopted reasonable and adequate means of advising the purchaser, Morton, that the seed was so offered, and in so doing performed its full duty to the purchaser, there being no evidence of fraud or bad faith; (2) Morton was chargeable with knowledge of the condition upon which the sale was made; and (3) Morton was chargeable with knowledge of the general custom which the jury found to exist. Under these conditions Morton would have no right of action against the defendant, and therefore his undisclosed principal would have no such right. These conclusions would, we think, follow if Morton acted as the agent of both parties, because it would be his duty as agent of the plaintiff to communicate to him the knowledge with which he was chargeable.

Considerable stress seems to be laid by respondent on the fact that prior to the purchase of the tobacco seed the defendant had sent to Morton a cabinet containing packages of garden seeds for sale on consignment and that no disclaimer was printed on these packages. If there was a general custom such as the jury found, it was immaterial whether there was a disclaimer on the packages or not, unless the defendant knew that Morton was ignorant of such custom, and there is no claim that it had such knowledge. Besides, if defendant

saw fit to sell its garden seeds with a warranty, that would be no particular reason why it should sell its field seeds in the same way. The damages recoverable for breach of warranty on the sale of small packages of garden seeds would ordinarily be inconsequential, while in the case of field seeds the reverse would be true. In the present case the pound of tobacco seed was sold to Morton for $2.25. The damages recovered were $1,015. It may seem unjust that the purchaser should suffer this loss. But it is apparent that if seed houses warranted their seeds they would have to sell at a very much higher price than if no warranty were given. If the defendant had sold 100 pounds of this seed instead of one pound, it would receive therefor $225, and on the basis of plaintiff's recovery would be liable for over $100,000 damages. It purchased the seed in Virginia and admittedly ordered the variety which the plaintiff desired. The evidence shows that there was no way in which the substitution could be discovered until the tobacco plants were pretty well grown. Large seed houses who draw their supply of seeds from different parts of this and perhaps other countries cannot well grow all the seeds which they handle. They are liable to be imposed on, and must either adopt the practice of selling without warranty or of selling with one and imposing on the consumer an added price sufficient to make good the losses sustained by reason of the failure of the seed sold to comply with the warranty.

A number of other questions are discussed in the briefs which have been considered but which need not be alluded to in the opinion, which is already lengthy enough.

By the Court.—Judgment reversed, and cause remanded with directions to dismiss the complaint.

A motion for a rehearing was denied, with $25 costs, on March 17, 1914.

PEDLAS, Appellant, vs. GOLBUS and others, Respondents.

December 10, 1913—March 17, 1914.

Garnishment: Requisites of affidavit in tort action.

An affidavit for garnishment under sec. 2753, Stats., in an action sounding in tort, must state all those things which are required by sec. 2731 to be stated in an affidavit for an attachment in such an action. MARSHALL, J., WINSLOW, C. J., and VINJE, J., dissent.

APPEAL from an order of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

This is an action sounding in tort against the defendants for an alleged assault and battery and false imprisonment of the plaintiff for damages to the amount of $10,000.

On May 22, 1913, the day this action was commenced, a court commissioner issued an order of arrest and required each of the defendants to furnish $3,000 bail. The defendants furnished the $9,000 bail and deposited the same with the sheriff. On June 14th following, upon application of the defendants, the order of arrest was modified and the bail reduced to $1,000 each. Upon the entry of this order the defendants were each entitled to recover from the clerk of the court, John H. Laabs, $2,000, or the excess bail furnished on the original order of arrest.

The plaintiff immediately garnished the $6,000 in the hands of John H. Laabs upon the following affidavit:

"State of Wisconsin, }
"Winnebago County, } ss.

"M. H. Eaton, being first duly sworn, deposes and says that he is one of the attorneys for the above named plaintiff, and makes this affidavit as her agent and on her behalf; that a summons has been issued in the above entitled action and served upon each of the above named defendants; that the same is an action to recover damages sounding in tort, exist-

ing in favor of the plaintiff and against all of the defendants, *Nathan Golbus, Mourice Block* and *Nathan Block;* that the damages sustained and claimed exceed the sum of fifty dollars ($50); that the amount of said plaintiff's claim is ten thousand dollars ($10,000) over and above all offsets; that said affiant verily believes that John Laabs is indebted to and has property, real or personal, in his possession and under his control, belonging to the said defendants, *Nathan Golbus, Mourice Block* and *Nathan Block,* and that such indebtedness and property are, to the best of knowledge and belief of this affiant, is not by law exempt from sale, seizure or execution.

"M. H. EATON.

"Subscribed and sworn to before me this 7th day of June, 1913. A. W. KIRST,

"Notary Public, Winnebago Co., Wis."

The defendants moved to dismiss the garnishment proceedings upon the ground that the affidavit did not comply with the requirements of the statute on garnishment. The issue upon this notice came to trial in the circuit court on July 5, 1913; and on July 14, 1913, the court ordered the garnishment proceedings dismissed for want of jurisdiction. This is an appeal from such order.

For the appellant there was a brief by *Eaton & Eaton,* and oral argument by *M. H. Eaton.*

For the respondents the cause was submitted on the brief of *Earl P. Finch.*

SIEBECKER, J. The trial court dismissed the garnishment proceeding for want of jurisdiction, holding the affidavit of garnishment as insufficient in that it failed to state that the defendants are not residents of this state or that their residence is unknown and cannot with due diligence be ascertained, or that the defendant is a foreign corporation. Sec. 2753, Stats., provides when a party may proceed by garnishment in circuit court actions and prescribes upon what conditions and in what manner the proceeding may be commenced. It provides: "Either at the time of issuing the sum-

mons or at any time thereafter, before final judgment, in any action to recover damages founded upon contract, express or implied, or in any cause of action mentioned in section 2731, or upon judgment or decree, . . . the plaintiff or some person in his behalf may make an affidavit stating the amount of the plaintiff's claim against the defendant, over and above all offsets, . . ." and that the person sought to be garnished is indebted to defendant or has property in his possession or control belonging to defendant which is not exempt from seizure or sale upon execution. The question is, Must such affidavit for garnishment in causes of action sounding in tort mentioned in sec. 2731, Stats., state all the elements required to be stated in an affidavit for the issuance of a writ of attachment in such causes embraced in sec. 2731? The object under both these sections is to impound the defendant's property and apply it in satisfaction of the demands the plaintiff has against defendant. Garnishment proceeding is, in effect, an attachment of the defendant's effects in the garnishee's possession or control. The authority of a plaintiff to employ this remedy is regulated by these statutes and their conditions must be followed. Reading the two sections of the statutes together, they show an intention by the legislature to give a plaintiff the right of garnishment in the causes of action wherein attachments may issue. It is not particularly stated in the garnishment statute what elements of the attachment statute shall be stated in the garnishment affidavit to entitle plaintiff to institute garnishment proceedings in causes of action mentioned in sec. 2731, Stats. It seems reasonable that it was intended that the right to proceed by garnishment to impound a defendant's property in causes embraced in sec. 2731 was conferred upon the condition that the right to an attachment is conferred, and that such condition must be shown to exist by affidavit before a party can proceed by garnishment in the manner prescribed in sec. 2753. Manifestly a party desiring to proceed by garnishment against a person in an ac-

tion sounding in tort must look to the provisions of sec. 2731 to ascertain the condition upon which such a right is granted. This section provides that if a plaintiff has a claim for damages for a tort against defendant he can proceed if it appears that his claim is in excess of $50, stating the amount, and further that defendants are not residents of this state or their residence is not known nor ascertainable with due diligence, or that defendant is a foreign corporation. It is therefore evident that these last conditions are necessary facts to be shown to entitle the plaintiff to proceed in garnishment against the defendant in a tort action. The proper and necessary way to do this is to allege them in the affidavit for garnishment. These considerations lead us to conclude that the affidavit of garnishment is fatally defective, and that the trial court properly dismissed this proceeding for want of jurisdiction.

By the Court.—The order appealed from is affirmed.

WINSLOW, C. J., and VINJE, J., dissent.

MARSHALL, J. (*dissenting*). The trial court assumed that the special circumstances mentioned in sec. 2731, Stats., requisite to use of the attachment remedy to realize on a cause of action sounding in tort, is also necessary to authorize the garnishee remedy in such an action under sec. 2753, Stats.

The latter statute provides that:

"Either at the time of issuing the summons or at any time thereafter, before final judgment, in any action to recover damages founded upon contract, express or implied, or in any cause of action mentioned in section 2731, or upon judgment or decree, . . . the plaintiff or some person in his behalf may make an affidavit stating the amount of the plaintiff's claim against the defendant, over and above all offsets, and stating that he verily believes that some person, naming him, is indebted to or has property, real or personal, in his possession or under his control belonging to the defendant or

either or any of the defendants in the action . . . naming him or them, and that the indebtedness or property mentioned in such affidavit is, to the best of the knowledge and belief of the person making such affidavit, not by law exempt from seizure or sale upon execution."

The affidavit in this matter fully complied with those requisites. There is nothing in the statute requiring any different statement in the affidavit in case of the cause of action sounding in tort than in case of its being to recover damages on contract. In either, all that is required, as to the cause of action, is a statement of "the amount of the plaintiff's claim against the defendant, over and above all legal setoffs." It is customary to state the nature of the claim, as whether upon contract or sounding in tort, but the statute does not expressly require it.

Appellant having thus literally complied with the requisites as to the affidavit in garnishment, it seemed the circuit court erred in dismissing the proceedings because of want of some further statement therein. The statute provides, specifically, the causes of action in which the garnishee remedy may be used and, just as specifically, what the garnishee affidavit must contain; the latter being the same in one cause of action as another. The reference to causes of action mentioned in sec. 2731, Stats., points to the named causes, first, for an indebtedness exceeding $50 over and above all legal setoffs due upon contract, express or implied, or upon judgment or decree, or second, an action sounding in tort, the damage sustained and claimed exceeding $50. The further statement required to be made in an affidavit for attachment by the letter, as well as the reason of the statute, are not essentials of the cause of action, but of the right to use the attachment remedy. So where it is said in sec. 2753 that the garnishee remedy may be used in any cause of action mentioned in sec. 2731 and specifying just what the affidavit in garnishment shall contain it seems that all one need look to

the latter section is for the nature of the cause of action referred to. The conditions precedent to use of the remedy are wholly found in sec. 2753.

In my judgment the circuit judge was clearly wrong and the course of the litigation has resulted in a very material judicial usurpation of a legislative function.

COOPER, Appellant, vs. HUERTH and others, Respondents.

January 14—March 17, 1914.

Principal and agent: Sales: Independent contract by agent: Special verdict: Form: Judgment contrary to finding as understood by all: Surprise.

1. **Agents through whom an article (in this case an automobile) is sold, even though the sale is evidenced by a written agreement between their principal and the buyer, may for the purpose of promoting their business as agents make an independent oral contract with the buyer on their own behalf and outside the scope of their agency, by way of warranty of the article sold.**
2. **Where the controversy was as to whether defendants, through whom as agents plaintiff bought an automobile, made for themselves, independently of the written agreement between their principal and plaintiff, an oral agreement to take the car back if it did not prove satisfactory, and a question submitted in the special verdict was supposed by counsel on both sides and by the court as well to cover that issue, and the jury so understood it and found thereon, upon sufficient evidence, in plaintiff's favor, it was error for the court afterwards, upon the theory that the verdict did not cover that vital issue, to find thereon and render judgment in favor of defendants.**

APPEAL from a judgment of the circuit court for Sauk county: E. RAY STEVENS, Circuit Judge. *Reversed.*

Action for breach of contract.

Plaintiff's claim was that the individual defendants, in their behalf and of the corporation defendant, the *Huerth-*

Schaefer Auto Company, of which they were the proprietors, sold to him an automobile, taking an old machine in part payment and his note for the deferred amount, $839, the note to be left in the State Bank of Sauk City, Wisconsin, to await a trial of the machine in respect to whether it would fill specified requirements so as to enable him to do his work therewith and if not the sale to be off and the note to be returned; that the machine wholly failed to come up to the guaranty made by defendants and on the faith of which it was purchased, whereupon plaintiff tendered it back and demanded a return of his note, which was refused; that the note, instead of being held subject to a test of the machine as agreed, was put in circulation whereby it, for a valuable consideration in due course, came to the ownership of a party to whom plaintiff was compelled to pay it, to his damage in the amount so paid.

The claim of defendants was that they, as agents for the Monona Motor Car Company and in no other capacity, sold the car to plaintiff; that the entire sale contract was embodied in a written agreement between their principal and plaintiff and contained no such guaranty as that claimed by him, and none other than as agents, and that the machine was in all respects according to the calls of such contract. The return of the machine and negotiation and payment of the note were admitted. Upon the trial the cause was opened to the jury on plaintiff's part upon the theory that the issue to be tried was whether defendants, for themselves, made an agreement in respect to the character of the machine as claimed in the complaint, and on defendants' part, upon the theory that they did not make any such contract nor any other except as agents, nor other than the one embodied in the writing.

Evidence was produced to support the two theories,—court and jury understanding that the wrong which plaintiff complained of was a breach of a contract made by defendants in their own behalf to induce plaintiff to make the writ-

ten contract. There was evidence to the effect that, in the negotiations for the purchase of the machine, plaintiff was assured that if it did not prove satisfactory it would be taken back and, as a test, plaintiff exacted and obtained assurance from defendants, personally, that it would go up a particular hill. It was established that the machine, in plaintiff's hands, would not perform satisfactorily by going up such hill. There was some conflicting evidence as to whether the failure was owing to fault in the machine or in operating it.

To maintain the defense the written sales contract was produced in evidence and proof was made tending to show that it was the only agreement respecting the machine.

At the close the conflicts were as to whether defendants made the contract claimed by plaintiff, agreeing that the test of capacity of the machine should be whether it would perform satisfactorily in respect to going up the particular hill, or whether the sole contract was the written agreement with the company for which defendants were agents. The court prepared this form of a special verdict upon the theory, at least as the parties supposed, that it covered all disputed matters in the case which were vital:

"(1) Did the defendants, or either of them, at any time during the negotiations for the sale of the car in question say that if the car was not satisfactory to the plaintiff there would be no sale?

"(2) Did the defendants, or either of them, at any time during the negotiations for the sale of the car in question, guarantee that this car would go up Yankee Hill?

"(3) If you answer questions No. 1 and No. 2, or either of them, 'Yes,' then name the defendant, or defendants, that made such statement.

"(4) If you answer questions No. 1 and No. 2, or either of them, 'Yes,' was the plaintiff induced to buy the automobile in question because of his belief in and reliance upon the truth of such statements?

"(5) Was the trouble with the car here in question caused by the failure of the plaintiff to properly operate or care for the car?

"(6) Did the plaintiff, at the time he returned the car to the defendants, demand that they return the consideration which he gave for the same?"

Counsel for plaintiff did not ask submission of any other question, assuming that question 1 was framed to cover the disputed matter of whether defendants made the agreement he claimed. That was the basis of the cause of action plaintiff supposed himself to have, the one to which all the evidence had been directed, and the one stated to the jury to enable them to understand the evidence.

Plaintiff's counsel requested an instruction which embodied the precise claim of plaintiff, but the same was not given. The court instructed the jury, briefly, as to each question, without saying anything to indicate that the form for verdict did not cover the precise matter of dispute, to wit, whether defendants, for themselves, made the agreement claimed to induce plaintiff to take the machine under the written contract.

All questions of the special verdict were answered in plaintiff's favor. Thereupon his counsel moved for judgment and counsel for defendants moved the court for judgment on the verdict and, as an alternative, for a change of answers so as to shape the verdict in defendants' favor and for judgment accordingly.

Both motions were denied and judgment was rendered in defendants' favor upon the theory that the vital question of whether defendants contracted, for themselves, with plaintiff, as he claimed was not covered by the verdict, that there was no evidence to warrant a finding on that matter in his favor, and that the court, in any event, could make the finding as to such matter in defendants' favor under the statute, sec. 2858*m*.

Counsel for plaintiff moved to set the judgment aside upon the ground of surprise; in that the only question in the case was whether defendants, for themselves, made the contract as claimed; that such question was the only one tried and re-

quired to be submitted to the jury, and that they were led to believe from the trend of proceedings up to the time of the announcement of the decision on the motions for judgment that the evidence produced raised a jury question in respect to the matter and that the court submitted question 1 to cover such matter. The motion was denied.

For the appellant there was a brief by *Bentley, Kelley & Hill,* and oral argument by *F. R. Bentley* and *J. H. Hill.*

For the respondents the cause was submitted on the brief of *Jones & Schubring.*

MARSHALL, J. The judgment must be reversed.

From the statement, which is a pretty accurate picture of the proceedings in this case, we cannot escape the conclusion that counsel supposed, and had good reason to suppose, that question 1 covered the vital matter in the case; that respondents' counsel likewise supposed; and that the court submitted the question in such belief. It was a misuse of sec. 2858*m*, Stats., to submit to the jury the cause upon one theory and then dispose of it upon another, referring to sec. 2858*m* for assistance. That section was not intended as an instrumentality for any such use. True, as the trial court thought, it was essential to a recovery by plaintiff to satisfy the jury that defendants for themselves made the special contract as regards the capacity of the machine. The record shows counsel understood that in commencing the action and in every step taken on the trial down to the last opportunity for saying anything or doing anything in the case.

That they were taken by surprise, in the end, by the decision that the special verdict submitted by the court to cover the conflicts did not cover the most vital matter, and that there was no evidence to support plaintiff's side, is most natural. Evidently, there was no one connected with the case who entertained such an idea. Counsel for defendants did not, else they would have moved for judgment notwithstanding the

verdict. They moved for judgment on the verdict which, obviously, was baseless. Their motion to change the answers so as to warrant a judgment in defendants' favor shows that they, as well as counsel for plaintiff, supposed that the court intended to and did submit plaintiff's claims to the jury. That the jury so understood it, we cannot doubt. All the evidence was directed to the point of whether respondents made the independent contract.

True, there was no evidence that the actor on defendants' part expressly stated that he made the agreement for themselves as principals; but the cause of action sued on involved that very matter as the vital point. The only fair view of the evidence is that it was directed to such point. The jury must have so understood it. We could not so reflect on counsel as to think that they traveled the whole course of this simple case without knowing what was required to make a good cause of action for their clients and whether the evidence produced raised a fair jury question in respect to the matter and supposed, and had the best of reason for supposing, it was covered by the verdict.

The right of appellant seems too plain to warrant further discussing the matter. That the evidence raised a fair jury question as to whether defendants made the contract as claimed; that the jury understood, and had a right to understand, such issue was covered by the form for verdict submitted for their use and that they answered the questions for the purpose of finding that defendants for themselves made the contract as to the capability of the machine for plaintiff's work, seems plain.

That it was perfectly competent for defendants, though acting as agents, to bind themselves by a contract entirely outside the scope of their agency, and for the purpose of promoting their business as agents, there can be no doubt. *Hull v. Brown,* 35 Wis. 652. The evidence tended to show that such a contract was made. The jury intended to find that

such a contract was made. The question which they supposed covered that vital matter, viewed in the light of the evidence and the whole trial of the case, meant what the jury supposed it to mean. It follows that the judgment should have been awarded to plaintiff on the verdict.

By the Court.—The judgment is reversed, and the cause remanded for judgment in favor of plaintiff.

KERWIN and TIMLIN, JJ., dissent.

CITY OF MADISON, Respondent, vs. SOUTHERN WISCONSIN RAILWAY COMPANY, Appellant.

January 15—March 17, 1914.

Statutes: Repeal: Municipal corporations: Ordinances: Construction: Street railways: Franchises: Duty to keep portions of streets in "proper repair:" Paving and repaving: New franchise omitting specific requirement of prior one: Additional requirements: "Regulation" of streets: Powers of council.

1. In general, a statute covering the subject matter of a former enactment repeals it.
2. Whether an entire statute was impliedly repealed by a later one covering, in general, the same subject, is a matter of legislative intention.
3. Repeals by implication are not favored and, so, an earlier enactment is not deemed repealed by a later one, unless the two cannot reasonably consist with each other.
4. Where a revision of an earlier law expressly repeals all prior acts and parts of acts inconsistent therewith, a purpose appears to retain such parts of the former as are not clearly repugnant to the latter.
5. The last rule restricts the first but does not save a substantial characteristic of the earlier enactment, omitted from the later one; the earlier enactment, thus characterized, and the later one, not so featured, are, in general, to be regarded as inconsistent and the former as falling under the fourth rule.
6. A statute obviously intended to supersede an earlier enactment, so supersedes, without any express repeal, thus annulling any particular provision of the later not incorporated into the former.

7. The stated rules for statutory construction are general, in respect to the situation to which they respectively apply; but are subservient to the supreme rule that the purpose of the legislature should be vitalized by judicial construction when it can be discovered from the whole enactment, by itself, or in connection with others or any circumstances characterizing it,—the intention being regarded as matter of fact, determinable by evidentiary rules and circumstances.
8. In case of a city ordinance being ambiguous, in that, read literally, or from some permissible viewpoint, the legislative body evinced gross carelessness in conserving the public interests, it is to be presumed there was no such purpose, and that should prevail if, by any reasonable construction, a cast can be given to the enactment consistent with due care.
9. In case of a superseding street railway ordinance which is complete in itself, but omitting features of the former ordinance which characterized it as a whole or containing new features, giving significant cast thereto, with a repealing clause as in rule 4, the words, "all acts" should, ordinarily, be regarded as not limited by the words "parts of acts."
10. In general, in case of a public utility franchise being reasonably susceptible of two meanings, giving rise to uncertainty as to which was intended, the language used should be construed favorably to the public interests.
11. In case of a superseding street railway franchise, granted by a common council, containing a condition burdening the grantee to keep the railway zone "in proper repair" and "in proper order and cleanliness" in the words of the original franchise, but omitting a particular condition of the latter, common to such franchises, burdening the grantee with the duty to pave and repave, as needed, the street within the railway zone; but framed so as, in the whole, to clearly evidence a purpose to burden the grantee with responsibility for the proper condition of the railway zone, the words "proper repair" and "proper order" should be given the broad meaning of including paving and repaving, where "proper repair" and "proper order" would reasonably call therefor in the judgment of the governing body of the grantor.
12. A franchise duty imposed on a street railway company to keep its railway zone in "proper order," is a continuing obligation, including duty to conform the character of the railway zone to the physical condition of the street outside thereof, as such condition, in the judgment of the governing body of the grantor, may from time to time be changed to accommodate the needs of the people.
13. A legal principle having been developed and declared, in general,

it applies to all situations within its scope, and is not limited to the particular situation suggesting it. The rule for the future is a part of the unwritten law which rests in principles; not merely in cases referred to for illustration.

14. The omission from a street railway franchise of a specific requirement of the old grant requiring the grantee to pave and repave the railway zone, as needed in the judgment of the grantor, but retaining the former requirement to keep the railway zone in "proper repair" and "proper order" and adding a new feature expressly making the grant "subject to such reasonable rules and regulations respecting the streets and highways as such council may from time to time enact," should be regarded as clearly intending to burden the grantee with the duty of keeping the railway zone in such condition as the grantor may reasonably require, changing the physical condition, from time to time, to that end.

15. A street railway company franchise granted upon the conditions mentioned, emphasizing the duty of the grantee under sec. 1862 of the Statutes, should be construed in the light of *State ex rel. Att'y Gen. v. Madison St. R. Co.* 72 Wis. 612, as reserving to the grantor authority to make regulations, from time to time, as regards paving and repaving the railway zone.

16. The term "regulation" as used in respect to the police power, is very comprehensive, extending to requirements as to creation of physical conditions and of preserving the same and of creating other conditions from time to time.

17. The term "reasonable rules and regulations" of "the highway as the council may from time to time enact," when used in a street railway franchise and as used, in effect, in the statute, sec. 1862, should be construed with regard to the broad comprehensive meaning of the term "regulation," the length of such a grant, the probable necessity for changes, from time to time, in the structural character of streets, the importance of absence of divided responsibility for the physical condition of the railway zone, and all other characterizing circumstances.

18. A municipality, with the broad powers of regulation as regards streets, may make reasonable regulations, burdening a public utility using the street with the duty to make, at its own expense, reasonable changes in the physical condition of the zone so used, irrespective of anything contained in the public utility franchise, and this broad power, it is under disability to contract away.

[Syllabus by MARSHALL, J.]

BARNES, J., dissents.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

Action to recover of defendant the cost of paving that portion of a street between its railway tracks and one foot outside the rails.

The question was whether defendant's franchise required it to bear the expense of the pavement in the particular region. From the time of its organization up to 1892, defendant operated under a franchise containing the following provision:

"Section 3. Whenever any street upon which any of said tracks may be located shall hereafter be paved or macadamized, the said railway company shall pave or macadamize the roadbed between and one foot on either side on the outside of the rails of the track of their said road, and shall at all times make and keep the track between and one foot on either side on the outside of the rails thereof equally as good as the streets shall be outside of their tracks, and shall correspond in surface and improvements with said street outside of said track."

That franchise was in existence when the paving in question was done, unless repealed by a franchise granted defendant in 1892 under which it was operating when such work was done. The new franchise was complete, in itself, being so framed as to cover all features of street railway construction, maintenance, and operation. It was granted to authorize displacement of the old horse-car system by a modern electric system, and contained this repealing language:

"All ordinances or portions thereof heretofore adopted which conflict with the provisions of this ordinance are hereby repealed."

The new franchise, in general, was worded the same as the old one with such changes as would make it adaptable to the use of electricity as a motive power. It differed in suf-

ficient respects to be, as a whole, in conflict with the old franchise, though by far the greater part was substantially a reenactment of the existing ordinance. The provision before quoted from the old franchise with reference to paving between the tracks was not carried into the new one. The language of the old franchise preceding the particular clause, and the language following, were substantially reproduced in the new one leaving the particular clause wholly absent from the latter. The remaining language which, without material difference, is common to both franchises, is as follows:

"(b) It shall be the duty of said company to repair any and all damages done to the streets, macadamized curbs, cross or sidewalks, gutters or other public or private property by the construction or repairing of the tracks along the streets as herein provided for; and further to protect and save harmless the city of *Madison* against all claims for damages arising from the construction, operation or management of the railway provided for herein."

In 1910 the common council of plaintiff, by due proceedings, determined to pave University avenue between Charter street and Park street with asphalt on a concrete foundation, and by ordinance passed June 10, 1910, ordered the defendant to likewise pave that portion of the street between its tracks and for one foot outside its rails. Defendant denied liability in that regard. Whereupon it was agreed that plaintiff should incur the expense of paving the entire street and then test its claim against the defendant by an action to recover the reasonable value of the work done within the railway zone. Such proceedings were duly had pursuant thereto that judgment was recovered against defendant for $4,567.64.

The pleadings and evidence show the facts stated. These additional matters are covered by the findings: The right of defendant to use the streets of plaintiff is referable to the franchise of 1892 requiring it to "keep the space between the rails of each track and for the space of one foot on the outside in proper repair so as not to interfere with travel

over the same." Prior to the paving in question the particular street had not been permanently improved. Portions thereof had been covered with crushed stone and defendant had likewise filled that part occupied by its tracks. The use of the street was such, prior to the paving in question being ordered, as to render the existing macadam unsuitable. Prior to July 11, 1910, the street within the railway zone was so out of repair as to render it unfitted for use by traveling across the tracks. A macadam made of crushed stone is not a proper pavement for the particular street under the circumstances existing. In case of the railway zone being so paved the surface would wear down between the tracks so that travel across the same would cause injury to the pavement outside such zone by disintegration of the unsuitable macadam pavement and parts thereof being deposited on the asphalt surface.

The provision of the franchise particularly referred to in the findings is a re-enactment of the old ordinance. It is in these words:

"(a) And said company shall keep the space between the rails of each track and for the space of one foot on the outside in proper repair so as not to interfere with travel over the same, and shall keep the same in proper order and cleanliness at its own cost and expense."

The later ordinance contained a new provision making the granted privilege conditioned in that it should be "subject to all general provisions of statute law now in force and applicable thereto and to such reasonable rules and regulations respecting such streets and highways and operation of cars as the said council may from time to time enact."

On the facts found as indicated judgment was rendered in favor of plaintiff.

For the appellant there was a brief by *Jones & Schubring,* and oral argument by *E. J. B. Schubring.* To the point that a provision in a street railway franchise requiring the rail-

way company to repair the space between the rails and one foot on the outside thereof "so as not to interfere with travel over the same" does not obligate the company to pave or repave the streets, they cited 3 Dillon, Mun. Corp. (5th ed.) § 1276; *Chicago v. Sheldon,* 9 Wall. 50; *State ex rel. Kansas City v. Corrigan C. St. R. Co.* 85 Mo. 263, 55 Am. St. Rep. 361; *Kansas City v. Corrigan,* 86 Mo. 67; *Williamsport v. Williamsport P. R. Co.* 206 Pa. St. 65, 55 Atl. 51; *Western P. & S. Co. v. Citizens' St. R. Co.* 128 Ind. 525, 26 N. E. 188, 28 N. E. 88; *Philadelphia v. H., M. & F. P. R. Co.* 177 Pa. St. 371, 35 Atl. 718.

William Ryan, for the respondent, in support of the claim that the obligation in the 1892 franchise includes the paving of the railway zone, cited *Brooklyn v. Brooklyn City R. Co.* 47 N. Y. 475, 7 Am. Rep. 469; *Binghamton v. Binghamton & P. D. R. Co.* 61 Hun, 479, 16 N. Y. Supp. 225; *Conway v. Rochester,* 157 N. Y. 33, 51 N. E. 395; *People ex rel. Russell v. Utica,* 45 App. Div. 356, 61 N. Y. Supp. 31; *Mechanicsville v. Stillwater & M. St. R. Co.* 35 Misc. 513, 71 N. Y. Supp. 1102, affirmed 67 App. Div. 628, 74 N. Y. Supp. 1149, reaffirmed 174 N. Y. 507, 66 N. E. 1117; *Binninger v. New York,* 177 N. Y. 199, 69 N. E. 390; *Rochester v. Rochester R. Co.* 182 N. Y. 99, 74 N. E. 953; *New York v. H. B., M. & F. R. Co.* 186 N. Y. 304, 78 N. E. 1072; *Schuster v. Forty-second St., M. & St. N. A. R. Co.* 118 App. Div. 197, 102 N. Y. Supp. 1054; *New York v. New York City R. Co.* 60 Misc. 487, 113 N. Y. Supp. 869, affirmed 132 App. Div. 156, 116 N. Y. Supp. 939; *New York v. Broadway & S. A. R. Co.* 130 App. Div. 834, 115 N. Y. Supp. 872; *New York v. Ninth Ave. R. Co.* 130 App. Div. 839, 115 N. Y. Supp. 876; *New York v. Metropolitan St. R. Co.* 130 App. Div. 842, 115 N. Y. Supp. 878; *Harrisburg v. Harrisburg P. R. Co.* 1 Pears. 298; *Ridge Ave. P. R. Co. v. Philadelphia,* 124 Pa. St. 219, 16 Atl. 741; *Philadelphia v. Ridge*

Ave. P. R. Co. 143 Pa. St. 444, 22 Atl. 965; *McKeesport v. McKeesport P. R. Co.* 158 Pa. St. 447, 27 Atl. 1006; *Philadelphia v. Thirteenth & F. Sts. P. R. Co.* 169 Pa. St. 269, 33 Atl. 126; *Reading v. United T. Co.* 202 Pa. St. 571, 52 Atl. 106; *Reading v. Reading & S. W. St. R. Co.* 215 Pa. St. 132, 64 Atl. 335; *Reading v. United T. Co.* 215 Pa. St. 250, 64 Atl. 446; *Columbus St. R. & L. Co. v. Columbus,* 43 Ind. App. 265, 86 N. E. 83; *State ex rel. New Orleans v. New Orleans & C. R. Co.* 52 La. Ann. 1570, 28 South. 111; *Danville v. Danville R. & E. Co.* 114 Va. 382, 76 S. E. 913; 27 Am. & Eng. Ency. of Law (2d ed.) 41; 36 Cyc. 1403–1405; Elliott, Roads & S. (3d ed.) §§ 985–989.

MARSHALL, J. The following rules are guides for determining whether an act of legislation repeals an earlier act relating, in whole or in part, to the subject covered by the later one:

1. In general, a statute covering the subject matter of a former statute repeals it. *Lewis v. Stout,* 22 Wis. 24; *State v. Campbell,* 44 Wis. 529.

2. Whether an entire statute was impliedly repealed by a later one covering, in general, the same subject matter, is a question of legislative intention. *Gilkey v. Cook,* 60 Wis. 133, 18 N. W. 639.

3. Repeals by implication are not favored and that has such force that an earlier act is not to be regarded as repealed by a later one unless the two are so manifestly and materially in conflict that the two cannot, reasonably, stand together. *Att'y Gen. ex rel. Taylor v. Brown,* 1 Wis. 513; *Att'y Gen. v. Railroad Cos.* 35 Wis. 425; *Milwaukee Co. v. Halsey,* 149 Wis. 82, 136 N. W. 139; *State ex rel. Hayden v. Arnold,* 151 Wis. 19, 138 N. W. 78.

4. Where an act revises an earlier law and expressly repeals "all acts or parts of acts inconsistent with it" a legis-

lative purpose is manifest to retain such parts of the former act as are not clearly repugnant to the later one. *Lewis v. Stout,* 22 Wis. 24.

5. The rule last stated, as to an act revising the subject matter of an earlier law and containing an express repeal of all acts and parts of acts inconsistent therewith, is restrictive of the rule that a revising act without a repealing clause repeals the act revised; but does not apply so as to save a substantive part characterizing the earlier act but omitted from the later one. The earlier statute so characterized and the later one omitting the particular feature are inconsistent and the former falls under the general repeal of "all acts and parts of acts inconsistent with and conflicting with the provisions" of the later act. *Smith v. Eau Claire,* 78 Wis. 457, 47 N. W. 830.

6. A subsequent statute, evidently intended as a substitute for one revised, operates as a repeal of the latter without any express words to that effect and, so, any distinct provision of the old law, not incorporated into the later one is to be deemed to have been intentionally annulled. Smith, Stat. & Const. Law, § 784; *Bartlet v. King,* 12 Mass. 537.

7. The numerous rules for statutory construction on the subject of repeal of an earlier by a later statute, are general, in respect to the particular situation to which they respectively apply; but are subject to the ultimate purpose of giving effect to the legislative intent, when from the whole body of an act, or by a comparison of the enactment with others, or other circumstances characterizing the new enactment, it is clear that a repeal was not intended and the real purpose can be carried out by aid of judicial construction.

It is manifest from the foregoing, that it is not always easy to determine whether a provision in an earlier law, not carried into a later one, covering in general, the subject of the former, is preserved, repealed, or annulled. Possibly no more striking instance of that can be pointed to than the re-

peal, in part, of the common law respecting perpetuities in personal property by incorporating the common into written law as to realty and omitting it as to personalty; as announced in *Dodge v. Williams,* 46 Wis. 70, 96, 1 N. W. 92, 50 N. W. 1103, became a matter of uncertainty nevertheless which continued for years, and was only substantially set at rest in *Harrington v. Pier,* 105 Wis. 485, 82 N. W. 345, and not so as to cease to be a subject of discussion until *Danforth v. Oshkosh,* 119 Wis. 262, 97 N. W. 258.

What is the legislative intention characterizing any particular enactment is largely a matter of fact to be determined from evidentiary rules and circumstances. That the ordinance in question was a general revision of the subject matter of the earlier ordinance and would fall as an entirety, including the provision relating to paving, under the first rule, if it were not for the repealing clause and in the absence of some manifest intent from legitimate evidentiary circumstances to the contrary, does not admit of any serious doubt. Again, that the particular clause requiring the owner of the franchise to bear the expense of paving in the railway zone was left undisturbed by the second rule,—aimed at the prevention of live repugnant provisions,—if the new act, as a whole, or the particular part of it as regards the duties of the owner of the franchise respecting the railway zone,—is repugnant to or inconsistent with the former act or provision thereof on the subject, unless there be a manifest intent to the contrary from legitimate evidentiary indications, is likewise plain. Again, if the particular provision of the old charter was such a substantial ground of liability as to characterize the franchise as a whole, so that leaving it out of the new one renders the old, with such provision, inconsistent with the new without it, then such particular provision must be considered as having been annulled under the sixth rule; unless it is manifest that the legislative purpose was not to treat any mere feature of the old charter, however import-

ant, as so characterizing the whole that the one with it could be deemed inconsistent, in the entirety, to the one without it, so as to fall under the language of the repeal,—"All ordinances . . . heretofore adopted which conflict with the provisions of this ordinance are hereby repealed."

Thus it is seen that, in a rather complicated situation like the one before us, to solve the controversy by reference to one general rule, closing our eyes to others, might be supported by very plausible logic and yet be very far from being true to the legislative purpose.

It might be said that, whereas there was a provision in the old ordinance requiring the owner of the franchise to pave the street area within the railway zone and there is none in the new one, there are no conflicting provisions on the subject, and so the one in the old ordinance is preserved by the plain repealing words of the clause,—that every part of the new ordinance can be given full effect and the particular provision, dealing with a subject omitted, be left undisturbed. But there stands the quite obvious circumstance that the city council intended to cover, by the last ordinance, all the relations between the city and the grantees of the franchise.

True, the specified repeal of portions of any existing ordinance inconsistent with the new one, in one view, is pregnant with the idea of there being portions of such existing ordinance to be repealed and portions to be preserved, but, when the subject is viewed, comprehensively, it is quite evident that the term "ordinances or portions thereof," coupling the two features together, was adopted without any definite idea of that kind; but rather in conformity to the ordinary way of closing a new enactment, designed to take the place of all prior laws on the subject. There would be no doubt but that, had the term "portions" not been used, the entire old ordinance would, plainly, stand repealed, both under the first rule mentioned and the sixth as well. It is difficult to read a contrary intent out of the new ordinance, since it

seems quite plain that there were no "portions" of ordinances to be repealed, except such as were parts of the old entirety. Had it been intended to repeal part of such entirety and preserve part, it seems the common council would have more clearly repelled the idea,—which was liable to otherwise exist from the apparent purpose of the ordinance to make a complete arrangement with the owner of the franchise,—by providing that all portions of ordinances conflicting with the new one should stand displaced by the new one, and not referred to existing ordinances as entireties at all. In that is seen a pretty strong ground for the belief that the words "or portions" were not used to cut down the scope of the words "all ordinances" but were used, either in a perfunctory way, or as matter of caution lest there should be something existing between the city and the owner of the old franchise not fully covered by the term "all ordinances."

The latter view is strengthened by this: The clause of the old franchise under consideration was so important to the city that in an attempt to regrant the franchise, it could not be regarded as otherwise than gross carelessness to leave out such clause, unless the common council purposed to nullify it, or supposed the same obligation, especially as to existing paved streets, was covered by other portions of the franchise. Courts, ordinarily, deal with too much consideration for members of a legislative body to ground a decision on a theory of their having been grossly careless, where such a result can reasonably be avoided. In situations somewhat similar to the one we have before us, courts have said that rather than impute to members of a lawmaking body gross carelessness or mistake, it should be presumed there was an intent to eliminate that particular provision from the law. *Goodenow v. Buttrick,* 7 Mass. 140; *Ellis v. Paige,* 1 Pick. 43.

So if the term "or portions" in the repealing clause was given the cast of rather adding to than modifying the words "all ordinances," the particular clause in question would fall

as part of the entirety under the fourth rule mentioned and it would fall, in any event, under the fifth rule. The clause created a specific duty and liability, as in *Smith v. Eau Claire,* 78 Wis. 457, 47 N. W. 830; therefore it was such a substantial part of the old ordinance and so characterized it that the new one, omitting it, was inconsistent therewith. In the cited case, there was substantially the same situation as we have here and it was held that the particular clause was displaced as a substantial part of the law of which it formed a part.

It follows that, principle and evidentiary circumstances concur in persuading us so strongly as to produce a conviction to a reasonable certainty that the intention in granting the franchise of 1892 was to make a complete charter, defining the rights, privileges, and liabilities of the grantee as regards the city and displacing the old charter, in its entirety, with the special requirement as to paving in the railway zone.

There is no need of referring to other particulars than that already mentioned in which the new franchise departed from the old one in order to provide proper authorization for an entirely new street railway system. Suffice it to say, such new franchise, notwithstanding many points of similarity, was a recast of the old one with so many variations on so many particulars that, as a whole, there was sufficient conflict between the two to form a mark for the language of the repealing clause directed at all ordinances. Moreover, as before suggested, as the old franchise was the only one within the call of such repealing clause, it must have been within the contemplation of the common council of the respondent as the one repealed.

The result of the foregoing is that, at the time appellant was ordered by the city ordinance of June 10, 1910, to do the paving in question, there was no express requirement in its franchise on the subject. So if there was any authority to

impose such a burden it must be found in some duty, independently of written law, or read out of the general spirit of the franchise by construction, or the particular clause in respect to "proper repair," or found in the particular conditions upon which the rights of the grantee were made dependable. We will refer briefly to these features.

The new franchise, in the very nature of things, conferred upon the grantee a more extensive use of the street than the old one. That was necessary to the new system. The street was substantially surrendered to the grantee within the railway zone. True, the public right to use the street was reserved as before, but only subservient to the reasonable exercise of the new and greater right. The nature of the service contemplated by the new franchise and the physical construction to afford such service required the grantee to possess pretty broad powers as to the railway zone. It was clothed with all authority necessary to make the connections for the electric service, including a ground or metallic return for the electric current, and it could only do that and have proper capacity to keep its line and give good service, by being afforded the exclusive authority to do whatever was necessary in that regard and there being no divided duties as to physical acts in respect to the conditions of the railway zone. The technical nature of the construction, required or permitted, and of the work of exercising proper care always to have the railway system in good repair and working order, was inconsistent with the performance of work, in general, by respondent's employees within such zone which would interfere with its physical condition. Full authority in these respects was conferred, upon appellant, in letter and spirit as well, coupled with an express condition, not found in the old ordinance, making the grant *"subject to all general provisions of statute law now in force and applicable thereto, and to such reasonable rules and regulations respecting such streets and high-*

ways and operation of cars as the said council may from time to time enact." There was also preserved in the new ordinance the provision of the old one in these words:

"The roadbed shall at all times correspond with the actual grade of the street and shall be so laid and maintained that carriages and other vehicles can easily and freely cross said track at any and all points. . . . And said company shall keep the space between the rails of each track and for the space of one foot on the outside in proper repair so as not to interfere with travel over the same, . . ."

Counsel for respondent suggest that the decision of this court in *State ex rel. Milwaukee v. Milwaukee E. R. & L. Co.* 151 Wis. 520, 139 N. W. 396, in principle, rules this case in its favor. Much, if not all, there said as to the matter of construction applies here. It is there suggested that, in granting such franchises, the common council acts as the trusted agency of the people in conferring a valuable privilege, it gives a large measure of private right whereby a paramount privilege to use a portion of the street is surrendered, and the municipal authorities are in a great measure, displaced from exercising that control necessary to keep the ways in a proper condition for public travel, and it is the grantor's duty to exercise a high degree of care in performing its trust and, so, it must be presumed, in construing any doubtful franchise provision that the common council endeavored to execute such duty and all provisions of any franchise susceptible of being used as conflicting, should be read as favorably as reasonable in favor of the public. Significance was given to the long franchise period,—thirty-seven years,—and the idea given prominence that the council, acting with the degree of care which it must be assumed it exercised, doubtless contemplated many changes in the character of the pavement would be required during such period and endeavored to protect the public in respect thereto.

Here the grant was for a still longer period than in the *Milwaukee Case.* It was for a street railway system in the capital city of the state and conferred at a time when existing pavements were liable very soon to become entirely unsuitable for such a city and be required to be replaced by new ones of permanent and modern character.

Therefore, considering the common manner of conserving public interests under the same or similar circumstances, if the council intended to eliminate the special provision of the old charter, and neither incorporated a substitute therefor into the new one nor prescribed any condition therein empowering the council to deal with the matters to which the old provision referred as occasions therefor might arise, it would seem to have grossly failed to perform its duty. The ordinance should have such construction as will avoid that result if that can reasonably be done.

Aided by logic as above, the court in the *Milwaukee Case* had no difficulty in rejecting the idea which under other circumstances found place in *Blount v. Janesville,* 31 Wis. 648,—that repairing cannot be considered as including paving or repaving. So it must be considered that the ruling thought of numerous decisions which may be found, some of which are cited to our attention, that an ordinance requirement of a street-car company to keep its railway zone in "a good" or a "proper" "state of repair," does not, under any circumstances, include paving or repaving, has been rejected here and the one adopted supported by much, and, as said in the cited case, the better authority, that where the proper conditions of a street, under all the circumstances, require paving or repaving, the requirement to repair may be phrased in such a way as to cover the matter. The court adopted, as a principle for guidance in this state, the doctrine deduced by Judge Elliott in his work on Roads & Streets, vol. 2 (3d ed.), at secs. 987, 988, from many authorities on the subject, after

giving due consideration, as was thought, to those conflicting therewith, which may be epitomized thus: Where the franchise granted to build, maintain, and operate a street-car system contains an express requirement to repair, it continues with the life of the grant, creating a duty of such performance as will make that portion of the tract to which it relates conform to the changes outside thereof, made from time to time under the direction of the municipality in order to render the way suitable for public use, and such performance includes, in making repairs after repaving by the municipality with the same material as before, and repaving by substitution of a different material to conform to this changed condition as well.

Now why does not that rule with the supporting authorities referred to, go to the full extent of including the circumstances of this case, as counsel for respondent claim? It certainly effectually excludes from our consideration the inconsistent theory, mainly relied on by counsel for appellant and supported by very respectable authority, that a requirement to repair does not include construction, or reconstruction of a pavement. The facts of the case, as found by the trial court, fall very clearly within that rule.

Here there was the express requirement to repair, emphasized by the word "proper;" and we must not overlook the significance of that word. There was, in the beginning, a pavement which could not have been reasonably expected to be other than temporary, then came the time of need, in order to put the street in a proper state of repair, to remove the old worn out pavement and put one in its place which would be suitable to the changed conditions. The common council acted within its power in providing for such pavement, and then ordered defendant to conform thereto.

True, in the *Milwaukee Case,* the principle was not carried so far as would be necessary for the purposes of this case, because the franchise there expressly required the railway com-

pany, in making repairs from time to time, to use the "same material as the city shall have last used to pave or repair, . . . previous to such repairs," in the absence of an agreement to use some other material. But when the court, upon due consideration, lays down a principle as controlling within a particular field and then applies it to a concrete situation in hand, it is not limited, as to the future, by the scope of that particular situation. If that were so, we would have a system of mere case law and no light dependable for the solution of problems as they arise, except that radiating from precedents. We have no such system, in fact, there is so much of habit to ground current decisions on what has been held as to the same or similar situations, by some court, or courts, somewhere, and on what particular justices have said, discoursing on matters before them in approaching and grounding a finality, that by laymen, quite commonly, and by some professional men and even courts, precedents are supposed to be the sole and dependable guides, whereas they are, generally, merely object lessons illustrative of the application of principles. So we must regard the doctrine, unqualifiedly adopted in the *Milwaukee Case,* to have been incorporated in the unwritten law of this state and test this case thereby, not by the mere facts of the former.

The scope of the principle adopted, as indicated, needs no extensive discussion. It was stated in unmistakable language by the chief justice in that case. It was supported by much authority, elementary and judicial. It is in harmony with the conditions of modern life. It is a natural development therefrom in the progressive spirit which does and should expand the zone of duty so as to meet, efficiently, the needs of changed conditions. It is in that way that the unwritten law, made up of principles rather than of mere precedents, does not and cannot, properly, stand still. It is a thing of growth and in that growth,—supplementing and reading out of the written law what it speaks in the light of the circumstances of

its origin,—progressive conditions giving rise to new duties or to the increase of old ones, are so dealt with as to conserve the public welfare.

The full scope of the rule announced in the *Milwaukee Case* may be best appreciated by reference to the illustration there given by quoting with approval from *Mayor, etc. v. H. B., M. & F. R. Co.* 186 N. Y. 304, 78 N. E. 1072, this language:

"The question of what shall constitute keeping a pavement in the tracks of a railroad company in good order and repair is to be determined somewhat at least with reference to existing and surrounding conditions, and in our judgment it would be altogether too narrow a view to hold that where a municipality had for sufficient reason decided to pave a street with asphalt or other new pavement a railroad might discharge its obligations to keep its part of the street in good order and repair by merely patching up a dirt road or some species of pavement which had become antiquated and out of condition and which was entirely different from that adopted in the remainder of the street."

The New York court before had and since has applied that principle to situations similar to the one in hand, and likewise the courts of Indiana, Florida, and other states. The doctrine has taken on such dignity as to be recognized and adopted in standard elementary works, as indicated by the citations in the *Milwaukee Case* which need not be recited here nor added to. The principle itself having become firmly established and the logic of it being well grounded, it would be sufficient to merely state it as to any situation falling within it.

Before leaving the subject above discussed it might be well to recognize the fact, as contended in the brief of respondent's counsel, that the principle adopted by this court in the *Milwaukee Case* comes far short of the one adopted in some jurisdictions. There it is held that, because of the practical surrender of the street within the railway zone to the use of the

street railway company, and the practical difficulties of divided responsibility for the physical condition of such zone, the common-law and statutory duty of the municipality as to such conditions passes with the franchise, subject to responsibility of the municipality to the public for performance; that it is obligatory on the holder of the franchise to comply with all reasonable regulations of the grantor in respect to paving and repaving of the streets and keeping them in a proper state of repair within the railway zone, without any conditions in the charter in that regard. *Reading v. United T. Co.* 202 Pa. St. 571, 52 Atl. 106; *Reading v. United T. Co.* 215 Pa. St. 250, 64 Atl. 446.

In the first case cited the court after reviewing its own decisions remarked:

"When, looking beyond the decisions referred to, we search for principles to guide us to a conclusion, we find first of all that it is recognized, with substantial unanimity, that a railway company, whether general or passenger, is bound to keep the portions of streets occupied by its right of way in good condition, even in the absence of any express contract or statutory direction to that effect."

In a later decision there is evidence that the court was not disposed to adhere to the broad rule announced, but in a still later decision the doctrine announced in the earlier case was reaffirmed:

"In that case, in affirming the judgment below, we adopted, as correctly expressive of our views, the words of the present learned trial judge, that 'It is recognized, with substantial unanimity, that a railway company, whether general or passenger, is bound to keep the portions of streets occupied by its right of way in good condition, even in the absence of any express contract or statutory direction to that effect.'" *Reading v. United T. Co.* 215 Pa. St. 250, 255, 64 Atl. 446.

We do not need to go that far at this time and, without expressing any disapproval thereof, but rather confessing a feel-

ing of force from the logic, we will rest the subject with the principle established in the *Milwaukee Case.*

Here we have a franchise with a provision as before indicated well within such principle. It requires the grantee thereof, at all times, to keep its railway zone in "proper repair so as not to interfere with travel over the same and keep the same in proper order and cleanliness at its own expense," language quite similar to that dealt with in *Conway v. Rochester,* 157 N. Y. 33, 51 N. E. 395; *Mechanicsville v. Stillwater & M. St. R. Co.* 174 N. Y. 507, 66 N. E. 1117; *Binninger v. New York,* 177 N. Y. 199, 69 N. E. 390; *Mayor, etc. v. H. B., M. & F. R. Co.* 186 N. Y. 304, 78 N. E. 1072, as for illustration: "The said grantees or their successors shall keep the surface of the street inside the rails and for one foot outside thereof in good and proper order and repair and conform the tracks to the grades of the streets or avenues as they now are or may hereafter be changed by the corporation." Here the franchise contains a quite similar provision as regards conforming the level of the railway zone to the grade of the streets and preserving such conformity. It was held that, in view of the object of such a requirement, it imposed a duty to comply with all reasonable regulations of the municipality as regards changing the character of the surface within the railway zone so as to harmonize with the rest of the street, and to the extent of putting down a new and better pavement whenever in the judgment of the municipality the public welfare required it. The great principle there declared is that, in the granting of such long franchises as the one in question, it must be presumed that a mutual intention existed that the grantee should not operate so as to obstruct the efforts of the authorities, in their wisdom, to maintain the streets up to any reasonable standard required in order to keep abreast of the times and afford the public the use of ways, in harmony with progressive demands growing out of increase of population, increase of use, and improve-

ments demonstrated by experience to be reasonably required to make such ways adaptable to changed conditions. That is what this court, in effect, said in the *Milwaukee Case* and it is now reaffirmed. The facts found by the trial court, as indicated in the statement, as to the necessity for substitution of a new pavement for the old one in order to put the street in a proper condition of repair, make a very clear case for the application of such principle.

If the foregoing discussion were not decisive of what the result should be here, there is another phase of the matter which the majority are of the opinion rules the case in favor of the respondent. I am firmly convinced, after a most careful study of the subject, that there is little or no room for logical escape from that conclusion and that it has more of an unanswerable basis to rest upon, if there be room for degrees in the matter, than the one that paving and repaving is included within the obligation of appellant to "keep the space between the rails of each track and for the space of one foot outside in proper repair," etc. I say this without intending to cast any doubt upon the soundness of the latter ground for the decision here to rest upon. I am well satisfied with it upon principle and authority, though I recognize, as was done in *State ex rel. Milwaukee v. Milwaukee E. R. & L. Co.* 151 Wis. 520, 139 N. W. 396, that the contrary view has much and distinguished support. *Kansas City v. Corrigan,* 86 Mo. 67; *Chicago v. Sheldon,* 9 Wall. 50; *Norristown v. Norristown P. R. Co.* 9 Pa. Co. Ct. Rep. 98; *Norristown v. Citizens' P. R. Co.* 9 Pa. Co. Ct. Rep. 102; *Norristown v. Norristown P. R. Co.* 148 Pa. St. 87, 23 Atl. 1060; Booth, Street Railways (2d ed.) § 243. The subject being one on which there is so much conflict of authority, and the case in hand having some circumstances which might be claimed to require an extension of the principle upon which the decision in the *Milwaukee Case* was grounded, it has seemed to me that if there are other circumstances, affording a firm and entirely

independent basis for a decision, the court ought not to pass it by.

The second ground for affirmance to which I have alluded, though after due consideration approved by the majority of the members of the court as sound, may not be as unqualifiedly indorsed as I assert its conclusiveness, so the high degree of satisfaction with it which I express may be, as the manner of supporting it will indicate, somewhat personal.

I may say, in passing, that the Chief Justice does not desire to express any opinion on the point I am about to discuss, while Justice BARNES is in favor of a reversal. In that situation, especially, in view of the conflict of authority on the first point, it has seemed to me not only proper, but a duty, to support such an important decision as the one we have reached by all the sound bases which are apparent. My brethren who concur with me on the second point agree as to the propriety of supporting the decision thereby, if they do not go so far as to share in my view as to the duty to do so.

The new ordinance, as before indicated, was granted upon the express condition of its being "subject to all general provisions of statute law now in force and applicable thereto and to such reasonable rules and *regulations respecting such streets and highways . . . as the said council may from time to time enact.*" That is very comprehensive. It must be viewed, in the light of what has been said, as having been made a condition of the grant for the purpose, in the words of the opinion in the *Milwaukee Case,* of serving and conserving public advantages which are valuable and substantial rather than trifling and inconsiderate. "All the intendments must logically be favorable rather than adverse to the public." Language which is "equally capable of two constructions, that construction which would safeguard the public interests, substantially, must be given preference to that construction which secures only insufficient or unsubstantial advantages to the public."

In short, any uncertainty of meaning in such a case must be resolved in a manner most favorable to the public, if such manner would be within the realms of reason, under all circumstances.

The term "rules and regulations respecting the streets and highways" does not mean merely "rules and regulations" as regards operation of cars, because "rules and regulations" in that regard are mentioned, conjunctively, in connection with *"rules and regulations"* respecting *"such streets and highways."* It seems that the latter must be construed to include "rules and regulations" regarding the physical condition of the railway zone. It may well have been thought that such a provision, broadly considered, would impose a much more comprehensive duty upon the railway company than the one regarding paving, as provided in the old franchise,—that the broader provision would better conserve the public interests than the old one.

In view of the duty of the common council to carefully and vigilantly guard public rights, it seems quite likely that the new provision was added for the purpose suggested. It harmonizes with the provision respecting "proper repair," with the general idea as to the duty of a railway company in respect to that part of the street within the railway zone and the importance of there not being divided responsibility as to operations which might otherwise interfere with its physical conditions.

The term "regulation" has often been said to be one of very broad import. Power in that regard extends to requiring changes in physical condition as well as manner of use. No court has taken a broader view in that than this court. *Chicago, M. & St. P. R. Co. v. Milwaukee,* 97 Wis. 418, 72 N. W. 1118; *Eastern Wis. R. & L. Co. v. Hackett,* 135 Wis. 464, 474, 115 N. W. 376, 1136, 1139; *Chicago, M. & St. P. R. Co. v. Fair Oaks,* 140 Wis. 334, 122 N. W. 810. It includes the power to widen, alter, and extend streets so as to provide

for the public convenience. *U. S. v. Harris,* 1 Sumn. 21, 26 Fed. Cas. 185, 193. Also to granting the use of part of a street, and the exclusive use, under some circumstances; *St. Louis v. Western Union T. Co.* 149 U. S. 465, 13 Sup. Ct. 990, and to authorizing or requiring physical changes. *McWethy v. Aurora E. L. & P. Co.* 202 Ill. 218, 67 N. E. 9; *State v. Murphy,* 134 Mo. 548, 31 S. W. 784, 34 S. W. 51, 35 S. W. 1132. The power to regulate is so broad that it includes power to prohibit under some circumstances. *Att'y Gen. v. Boston,* 142 Mass. 200, 7 N. E. 722. The term being thus broad, does it not include power to prescribe a condition of use such as to repave? In *Fielders v. North Jersey St. R. Co.* 68 N. J. Law, 343, 53 Atl. 404, 54 Atl. 822, the question was whether the general police authority of a city to regulate the use of its streets included power to require a street railway company to repave within the zone of its tracks in case of that being necessary. The nine members of the court, by one majority, decided in the negative, the affirmative being maintained in a very vigorous dissenting opinion. As I read the opinions I cannot doubt that if the court had been dealing with an express condition, in this case, having the appearance of being a substitute for one in a previous franchise on the subject of paving, the decision would have been unanimous in favor of the idea here maintained.

"To regulate is to govern by, or subject to, certain rules or restrictions. It implies a power of restriction and restraint, not only as to the manner of conducting a specified business, but also as to the erection in or upon which the business is to be conducted." *Rochester v. West,* 164 N. Y. 510, 58 N. E. 673. The principle thus applied is familiar. It is this: In case of a municipal power of regulation, either of a general nature over a particular subject or of a particular nature, as here, where it is a condition of the grant and the power exists for the conservation of public safety, convenience,

and welfare, any ordinance under it which is reasonable and in compliance with its purpose, is lawful.

Many more illustrations of the comprehensive meaning of the word "regulate" in situations somewhat similar to that in hand might be mentioned. Probably no better illustration could be given than to point to the history of the subject found in the many decisions of the federal courts on the power of regulation of interstate commerce. They have gone so far that it is very difficult to suggest limitations and the decisions are so familiar that citations seem unnecessary. As to the general scope, *St. Louis v. Western Union T. Co.* 149 U. S. 465, 13 Sup. Ct. 990, is sufficient. The court there said of the word "regulate," it "is one of broad import. It is the word used in the federal constitution to define the power of Congress over foreign and interstate commerce, and he who reads the many opinions of this court will perceive how broad and comprehensive it has been held to be. If the city gives a right to the use of the streets" as in the ordinance "it simply regulates the use when it prescribes the terms and conditions upon which they shall be used." That has been many times referred to in the federal and other courts and significantly in *Baltimore v. Baltimore T. & G. Co.* 166 U. S. 673, 17 Sup. Ct. 696, where the court added:

"This power of regulation is a continuing power; it is not exhausted by being once exercised, and so long as the subject is plainly one of regulation, the power may be exercised as often as and whenever the common council may think proper; the use of the street may be subjected to one condition today and to another and additional one tomorrow, provided the power is exercised in good faith and the condition imposed is appropriate as a reasonable regulation, and is not imposed arbitrarily or capriciously."

It is interesting to observe how the ordinary meaning of the term under consideration has been broadened in judicial

conception by the manner of its use. In *Owensboro v. Cumberland T. & T. Co.* 174 Fed. 739, 750, it was said:

"What power is delegated by the express power to 'regulate' the streets and alleys of the city? Manifestly, something was meant by the power to 'regulate.' The word 'regulate' imports the power to control the use of the streets, and is indeed a power of wider import than 'control' or the power to 'consent' to an easement of way."

Holding to the broad meaning suggested, there are many circumstances of imposition of burdens upon railway companies, telegraph companies, telephone companies, and persons possessing franchises for conducting public utility business, as a condition of using streets. Such impositions when thought to be within reason and for regulation instead of revenue, have been uniformly upheld. With that idea railroads have been compelled to abolish grade crossings in cities by lowering or raising tracks, and to pay the expense of constructing and keeping in repair and reconstructing crossings regardless of any conditions in their charters expressly so requiring. This court took advanced views on that in *Chicago, M. & St. P. R. Co. v. Milwaukee,* 97 Wis. 418, 72 N. W. 1118, which has been many times followed and approved as a leading authority. There this court discussed, at considerable length, the conflict of authority as regards the right of a municipality to burden, under the police authority to regulate, a railway company, using to any extent a public way, with the expense of constructions reasonably required, in the public interests. It was shown that the broad power of regulation, so hard to define definitely but so extensive in fact, having no limitations except legitimacy of purpose and reasonableness of means, had been lost sight of by many courts,—resulting in matters within it being treated from the standpoint of whether they were not breaches of contract rights. It had been overlooked, as was thought, that a municipality cannot materially, if at all, contract away its police power; that if

it should attempt to do so the attempt would be futile. That being so, how much the power is dignified, so to speak, emphasized, where, in the franchise grant, as in this case, the privilege is made expressly dependable upon observance of "all such reasonable regulations of the streets and highways as the council may see fit from time to time to enact."

In *Eastern Wis. R. & L. Co. v. Hackett,* 135 Wis. 464, 115 N. W. 376, 1136, 1139, an ordinance of the city of Oshkosh was challenged as violative of the railway company's franchise contract rights. The ordinance required the railway company to make important and expensive physical changes at its own expense. The court, speaking by Mr. Justice TIMLIN, held that the acts of the city were well within its power of regulation which was not impaired by anything contained in the street-car franchise, but rather confirmed thereby, and, particularly, referred to sec. 1862, Stats. (1898), declaring that a street railway company shall be "subject to such reasonable rules and regulations . . . as the proper municipal authorities may by ordinance from time to time prescribe," and also referred to *Chicago, M. & St. P. R. Co. v. Milwaukee,* 97 Wis. 418, 72 N. W. 1118. We should note, in passing, that the general statute, thus given efficiency in the Oshkosh case, quite as logically applies here,—especially, since the conditions of the grant expressly required subserviency "to all general provisions of statute law now in force and applicable."

Now can there be any doubt but that, even without special authorization to municipalities in granting the use of streets within their limits for street railway purposes to impose reasonable conditions as to regulation, they commonly exercise such power and make grants in that regard upon condition as to repair and also paving and repaving within the railway zone? All such conditions which are reasonable and imposed for regulation, as distinguished from revenue purposes, have been sustained. It must be conceded that the requirement to

pave in the old ordinance, was matter of regulation. It might have been, and probably was, made a condition of the new grant as matter of regulation rather than matter of contract. If such a provision is within the power of reasonable regulation in case of an original grant, and of that there can be little or no doubt, when did the city of *Madison* lose that power?

If it could fairly be said that all not within reasonable requirements for public safety, in such a case, may be parted with by contract, or is so parted with in case of a grant without specific reservations covering the subject, *State ex rel. St. Louis U. S. Co. v. Murphy,* 134 Mo. 548, 31 S. W. 784, 34 S. W. 51, 35 S. W. 1132,—here there was such reservation *ex industria* and most emphatically made by the direct reference to existing statute law, and making subserviency thereto and to municipal requirements thereunder and the provision in the language of the statute a condition of the grant.

Was it for any mere narrow purpose of conserving public safety in a field unquestionably covered by the police power, that the significant new provision was made a part of the ordinance? Does it not seem clear that the purpose was, in addition to ordinary police authority, to retain power to make regulative requirements within the broader field of police power and perhaps beyond,—power to make such reasonable requirements from time to time as changed conditions might render necessary in the interest of public welfare, whether technically within the field of ordinary police regulations or not? For things within such ordinary field no reservation of authority was needed. Nothing in the grant did or could impair it even to the extent of even involving it in doubt.

Must we not then, logically, conclude that the whole new condition in the ordinance was embodied therein for a very considerate and important special purpose? It could not have had reference to mere operation of cars on the road be-

cause, as we have seen, that was specially and separately provided for. What could the parties to the grant have had reference to except things in the broad and most comprehensive field of regulation,—such things as gave rise to this litigation? What possible justification or excuse was there for omitting to incorporate into the new grant the provision of the old one on the subject of paving, except that it was matter of reasonable regulation of the streets and highways in the broad sense of sec. 1862 aforesaid and certainly covered by the express conditions of the grant, especially in connection with the duty as to "proper repair"? The mere specific duty was dropped out and a broad condition was substituted embodying the statute affording the municipality the stronger position.

The foregoing gives much significance to the manner of municipal proceedings in respect to the particular pavement. It did not, merely, notify appellant to put the street in "proper repair" as if seeking to arouse defendant's duty in that regard. It adopted, in the most formal way, an ordinance, in effect, ordering appellant to make the improvement. That pretty clearly was thought to be warranted by the condition of the franchise making it dependable upon conforming, in respect to the streets and highways, to "such reasonable rules and regulations" in respect thereto "as the said council may from time to time enact." If the particular condition has reference to physical conditions within the railway zone,—of which I am convinced, and the members of the court, except as aforesaid, are constrained to believe,—in view of the findings of fact, it probably would be conceded by all that the particular regulation is reasonable.

Up to this point we have discussed the second ground requiring affirmance as an original matter. But need it be so considered? It seems that sec. 1862 of the Statutes was overlooked below and here. Why so when its significance in view of the principle at stake was passed upon in *State ex rel. Att'y*

Gen. v. Madison St. R. Co. 72 Wis. 612, 40 N. W. 487, in respect to the original charter of appellant? It was there contended, in an original action in this court to annul the company's franchise, that its failures to comply with municipal requirements were, at most, mere breaches of contract; but the court held that they were breaches of the conditions upon which the grant was made and held that sec. 1862 of the Statutes was in itself a sufficient answer to all the company's contentions. The spirit of the decision is that such statute is a part of such a franchise and contemplates that the municipality shall have the broad continuing power of regulation, enabling it to deal with conditions as they may exist from time to time. The significant language of the statute was specially referred to "subject to such reasonable rules and regulations as the proper municipal authorities may by ordinance from time to time prescribe." The idea of the lawmakers is that the broad power is not subject to exhaustion or limitation by any specific requirement in the grant. Note the words "from time to time," showing the legislative idea was that changed conditions, within the life of such a franchise, will be quite likely to require physical and other changes in the manner of using the streets which could not be foreseen and particularly provided for in advance. The litigation, in which the decision referred to was made, terminated a short time before the common council of the city of *Madison* came to deal with the matter of the substitute ordinance. It was doubtless fresh in the minds of its members and they gave such dignity to sec. 1862, in connection with the proper repair provision, as to suppose nothing more to be needed; so the special provision on the subject of paving was omitted and the new one added, giving special prominence to the statute by the words "subject to all general provisions of statute law now in force and applicable thereto" so recently passed upon and given the broad comprehensive meaning indicated, followed by substantially the very language of the

statute. This history gives striking significance to the circumstance that the requirement in this case was made by a formal ordinance following the terms of the statute and the franchise as well.

By the Court.—Judgment is affirmed.

SIEBECKER, J., took no part.

BARNES, J. (*dissenting*). It is pointed out in the *Milwaukee Case* (151 Wis. 520, 139 N. W. 396) that the weight of authority is to the effect that an obligation imposed on a street railway company to keep the portion of the streets between and adjacent to its tracks in a proper state of repair does not impose the duty of repaving. Some stress is laid on the fact that the duty imposed was not simply to repair the pavement, but to "keep and maintain in good and thorough repair during the continuance of said term" a certain portion of the street. Page 529. In the case before us for decision now the street railway company is required to keep the street in "proper repair." It was held in the *Milwaukee Case* that the language of the ordinance was broad enough to include repaving if the parties intended that it should be included, and, there being doubt about what the intent was, it was held that the ordinance should be construed strictly against the railway company and liberally toward the public. Proceeding on this line of reasoning, the court decided that the street railway company was bound to repave. Were it not for the ordinance granted defendant's predecessor in 1884, I should find no difficulty in saying that the decision in the *Milwaukee Case* should govern the present one.

It must be conceded (1) that the ordinance before us does not by express language cover repaving; (2) that the majority of courts hold that it does not do so by implication; and (3) that the ordinance, being ambiguous, must be construed so as to carry out the intention of the parties, if that inten-

tion can be ascertained with reasonable certainty. There is no question of private or public consideration that can ever justify a court in placing a construction on an ambiguous contract known to be one that defeats the intention of the parties thereto, and neither is there any justification for construing an ambiguous act of the legislature or of a common council so as to defeat the intent of the legislative body, if that intent is manifest.

To my way of thinking it is perfectly clear that the parties to this franchise did not intend to impose the cost of repaving on the railway company.

The council when it adopted the 1884 franchise had clearly in mind that the obligation to repair did not or might not include that of repaving. Sec. 2 of that ordinance covered repairing and was literally copied into the ordinance of 1892. Sec. 3 of the 1884 ordinance expressly and definitely covered the matter of repaving. This was entirely omitted from the ordinance of 1892 and was repealed by it. So we have a case where the council had before it an existing ordinance which required both repairing and repaving to be done and where it repealed the section imposing the duty to repave and re-enacted the one which imposed the duty to repair, and yet it is said that it intended to impose both duties on the defendant. I can well see how a council might ordinarily think that the duty to repair included the duty to repave. But where the ordinance which was about to be superseded and repealed specifically imposed both duties, it is inconceivable that, if it was intended to impose both by the new ordinance, the part of the old which provided for one of them should be actually repealed. The attention of the council was sharply called to the fact that repairing and repaving were two different things.

The ratiocination by which the conclusion is reached that the council of 1892 was guilty of gross negligence, if not something worse, unless it was intended to impose the duty to

repave, seems to me to be passing strange. Within their delegated powers common councils can grant such franchises as they see fit. It is a perfectly harmless occupation if no one is willing to accept the thing granted. Franchises are essentially contracts, generally arrived at as the result of mutual concessions. In all probability the defendant was not in as prosperous a condition twenty-one years ago as it is now. It was then operating cars propelled by horse power. The city no doubt desired rapid transit, and the principal purpose of the 1892 ordinance was to permit the street railway company to electrify its lines. There was plenty of consideration for relieving it from the burden of repaving, and it would be assuming altogether too much to say that such relief was granted because the council was either incompetent or dishonest.

The right to lay tracks in the street was granted subject "to such reasonable rules and regulations respecting such streets and highways and operation of cars as the said council may from time to time enact." I do not conceive that this general provision covers anything aside from the manner in which the streets should be used and in which cars should be operated therein. It seems to me to be far fetched to say that the reservation of the right to pass the rule or regulation referred to comprehended the right to compel the construction of a part of a street. If a part, why not the whole? If the whole, then an easy way has been discovered to relieve the city from the expense of street building along the line of defendant's road. I confess that I am too dense to see how the right to pass a rule or regulation respecting a street gives authority to compel a user to build it. The city having by express provision in the franchise specified what the defendant was required to do in the way of repairing streets, and having repealed the provision of the old ordinance in regard to the repaving, it is perfectly manifest that the general provision above quoted was not intended to cover repairing or repaving.

LEORA, by guardian *ad litem*, Respondent, vs. MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, Appellant.

February 4—March 17, 1914.

Railroads: Injury to employee: Interstate commerce: Waiver of objection that federal statute governs: Child labor law: Violation: "Track repairing:" Liability of employer: Contributory negligence not a defense: Appeal: Verdict upheld: Expert testimony: Hypothetical questions.

1. In an action by a railway employee for personal injuries, the objection that the plaintiff was employed in interstate commerce and hence that the case is governed by the federal statute, if not raised before or during the trial, is waived and cannot be raised for the first time on appeal.
2. Where a boy under the age of eighteen, employed as member of a section crew, was injured while riding on a handcar to a point where he and the other members of the crew were to move a switch track so as to facilitate the loading of cars from an ore pile, he was in every substantial sense employed in "track repairing" within the meaning of secs. 1728*f*, 1728*h*, Stats. 1911, which prohibit and make a misdemeanor the employment of a child under eighteen years of age in such work.
3. The purpose of the statute being beneficent, it should be liberally construed to accomplish the end for which it was designed.
4. The violation of the statute, being made a misdemeanor, results in liability for consequent injuries to the infant employee, regardless of the question of contributory negligence.
5. The expert testimony being conflicting, and nearly evenly divided as to number of witnesses, upon the question whether plaintiff was rendered imbecile as the result of his injury, or was merely suffering from hysteria, the verdict of the jury in that regard will not be disturbed on appeal.
6. The evidence of a physician that he based his diagnosis of a fracture at the base of the brain, in the case of a patient who was unconscious, delirious, and suffering from severe injuries, lacerations, and contusions of the face, in part upon the history of the accident told him by some person, did not render his opinion incompetent on the ground that such history was not shown to have been truthful, especially where he was not asked to detail the history so given to him.

7. It being competent for the physician in such case to testify that in his judgment there was a fracture at the base of the brain, it was competent to include that fact in a hypothetical question addressed to other medical experts.

APPEAL from a judgment of the circuit court for Douglas county: FRANK A. ROSS, Circuit Judge. *Affirmed.*

This is an action to recover damages for personal injuries suffered by the plaintiff, who was injured while employed by the defendant. Many of the facts were undisputed. The plaintiff, a youth seventeen years and seven months of age, was employed as a section hand on the defendant's railroad, at the station of Hoyt, about six miles west of Hurley, Iron county, Wisconsin, early in July, 1911. He was injured on the 28th day of July, 1911, by jumping or falling from a handcar on which he was riding to work. The section crew consisted of nine persons, viz. the foreman, four adults, and four boys between seventeen and eighteen years of age. About seven miles of track was taken care of by this crew, of which about half consisted of a spur track running east from Hoyt to the Montreal mine; the same being used for hauling iron ore from the mines to the main track and supplies from the main track to the mines. On the morning in question the crew started on a handcar from the station of Hoyt and went east toward the Montreal mine, where they were to throw or move one of defendant's switch tracks used for the purpose of loading iron ore toward the stock pile, so that the ore on the stock pile could be more conveniently loaded on cars.

A train, consisting of an engine pushing three or four cars, had preceded the handcar from Hoyt to the mine, and the section foreman knew of the train ahead of them, but did not know at what time it left Hoyt or how far ahead of them the train was.

The nine members of the section crew had propelled the

handcar from the station of Hoyt up the grade where it passed over the Northwestern railroad track on a bridge, and then there was a descending grade for about 1,700 feet, then a level grade about 500 feet, then again ascending, something like 2,000 feet, to the mine. A few hundred feet from the foot of this last ascending grade there was a sidetrack leading to the barn, about 700 feet. The switch, to go from the main track on this sidetrack, was located at the west end of the sidetrack.

After the handcar had crossed over the Northwestern track, on the bridge, and had proceeded about half way down the grade, the foreman and the other men on the car discovered that the train was stalled on the barn track, about 500 feet east of the barn switch. The engine started back, and the foreman ordered Andrew Gutt, who was in charge of the brake, "Put on the brake."

Up to the time the car passed over the bridge over the Northwestern railroad three of the boys, including the plaintiff, stood on the forward part of the car with their backs to the front and were helping to pump the car. The Gutt boy was at the side of the car in charge of the foot brake, and the foreman and the four men were standing on the rear of the car facing the direction in which the car was moving. After starting down the grade the boys on the front part of the car turned around and faced forward. They then took hold of the tool handles, which are small pieces of iron fastened to each side of the central shaft or framework of the car, to which the pump handles are fastened, the handles themselves working up and down without assistance. When the order to apply the brake was given there was evidently some excitement among the three boys in front, who turned around and attempted to take hold of the pump handle again in order to help stop the car and avoid collision with the engine. In some way the plaintiff fell off the car (the defendant claims he jumped off in order to try and stop the car from

the ground) and was seriously and permanently injured. The car was stopped after running some sixty feet further.

A special verdict was returned by the jury, as follows:

"(1) Was the defendant, or any officer, agent, servant or employee thereof, other than the plaintiff, guilty of any want of ordinary care that directly contributed to plaintiff's injury in either of the following particulars:

"(a) As to furnishing to plaintiff a reasonably safe place in which to perform his work, while assisting in the operation of the handcar at the time of the accident? *A.* Yes.

"(b) In the management and operation of the handcar at the time of the accident? *A.* Yes.

"(2) Was the plaintiff guilty of any want of ordinary care that directly contributed to his injury? *A.* No.

"(3) If in answer to question 1 you find that the defendant, or any officer, agent, servant or employee thereof other than the plaintiff, was guilty of want of ordinary care that directly contributed to plaintiff's injury, and if in answer to question 2 you find that the plaintiff was guilty of want of ordinary care that directly contributed to his injury, then answer this: Was such want of ordinary care on plaintiff's part slighter or greater as a contributing cause to such injury than such want of ordinary care on the part of the defendant, or any officer, agent, servant or employee thereof other than plaintiff? *A.* ——.

"(4) What amount of money will reasonably compensate the plaintiff for his injuries? *A.* $9,000."

Judgment for the plaintiff having been rendered on this verdict, the defendant appeals.

For the appellant there were briefs by *W. A. Hayes* and *Luse, Powell & Luse,* and a supplemental brief by *Mr. Hayes,* and oral argument by *Mr. L. K. Luse* and *Mr. Hayes.*

For the respondent there was a brief by *W. P. Crawford,* attorney, and *John R. Heino,* of counsel, and a supplemental brief and oral argument by *Mr. Crawford.*

WINSLOW, C. J. At the threshold of this case we are met with the objection that the plaintiff was employed in inter-

state commerce when injured, and hence that the case is governed by the federal statute regulating actions for injuries suffered by employees of interstate carriers.

This objection was not made in the trial court, nor was it made in the briefs filed in this court upon the appeal, but was first raised upon the oral argument. The question is important and far reaching. It is not in the strict sense a jurisdictional question, because the court has power to try the case whichever law be applicable. If a defendant can carry its case through the trial court without raising the question of the application of the federal law, and, when defeated, come to this court and for the first time raise the question successfully, it possesses a very valuable advantage. It can experiment through both courts with one law, and, if defeated, commence over again under the other law, thus securing two trials, even though the first trial be without objection or exception. Such a conclusion should not be reached unless it is inevitable. Every instinct of fairness and justice cries out against it. It is a question also which seems likely to occur with more or less frequency so long as the two laws exist side by side with varying and contradictory provisions on essential matters. The line which divides employment in interstate commerce from employment in intrastate commerce is at times very shadowy and difficult to draw. If the question may lie dormant in the trial court and be raised for the first time in the court of last resort, it is very certain that many a case fairly tried under the terms of one law, and in which every right secured to the parties by that law has been carefully safeguarded, will have to be reversed and a new trial awarded because of an objection never brought to the attention of the trial court.

There is a well established legal principle which forbids this result, and that is the principle of consent or waiver. This principle has been frequently applied in cases where it is claimed in the appellate court for the first time that a law,

under which a recovery has been had in the trial court, is unconstitutional.

It is correctly said by Mr. Cooley in his work on Constitutional Limitations (7th ed.) at page 250, "where a constitutional provision is designed for the protection solely of the property rights of the citizen, it is competent for him to waive the protection and to consent to such action as would be invalid if taken against his will." There is really no room for debate as to the correctness of this principle; it is held by all courts so far as civil proceedings are concerned. See 8 Cyc. 791–795, and the authorities there collected in the notes.

This court has recognized and applied it in *Lewis v. American S. & L. Asso.* 98 Wis. 203 (73 N. W. 793), at page 227, where it is said that "a party may by his own act or conduct preclude himself from insisting upon constitutional objections to a statute affecting his rights."

It seems very clear that if a person may by conduct waive the objection that a statute is void for unconstitutionality, he may, *a fortiori,* waive the objection that the operation of a state statute has been suspended as to certain classes of cases by the enactment of a federal statute covering the same field. Consent or waiver may be evidenced in many ways, as reference to the cases will show, but one very effective way is by taking part without objection in judicial proceedings when good faith demands that the objection be made if it is to be made at all.

The principle is very well expressed in *Vose v. Cockcroft,* 44 N. Y. 415, at page 424, where it is said: "By failing to raise it [the question of the constitutionality of the act] or to present it in any form for the consideration of the court below, he waived it as effectually as he could have done by express stipulation." See, also, *Cowenhoven v. Ball,* 118 N. Y. 231, 23 N. E. 470, and *Dubuc v. Lazell, D. & Co.* 182 N. Y. 482, 75 N. E. 401.

The trial in the present case proceeded from start to finish on the basis that it was a case brought under and governed by the state law. It is true that the complaint alleges and the answer admits that the defendant's railway system extends into and through the states of Michigan, Wisconsin, and Minnesota, and that this fact is admitted in the answer, but this is a fact which is doubtless a matter of common knowledge and of which the court would probably take judicial notice. No suggestion was made during the trial, however, either that the road was an interstate road or that the plaintiff was engaged in interstate commerce when injured, nor was any claim made in any way that the federal law could have any application. In fact, the defendant at the close of the trial submitted several questions for the special verdict, one of which was almost in the exact terms of the third question prescribed by sec. 1816, Stats. 1911, which is the state law applicable to actions for injuries received by railway employees in the course of their duty.

We shall not attempt to lay down here any hard-and-fast rule as to the manner in which the question should be brought to the attention of the trial court. We should not deem any formal pleading necessary, but we should deem it essential that at some time before or during the trial, and at a time when the opposing party has proper opportunity to meet the question by evidence, the objection that the case falls under the federal liability act should be distinctly made, and thereafter insisted on. Otherwise we should consider the objection as waived.

In the present case nothing of this kind was done, and we regard the defendant as having consented to try the case under the terms of the state law. It becomes unnecessary, therefore, to consider whether the evidence showed a case to which the federal law was applicable, and we express no opinion on that question.

Turning to the consideration of the errors claimed by the appellant, we find none that call for reversal of the judgment.

Our statute provides (secs. 1728*f* and 1728*h*, Stats. 1911) that "No child under the age of eighteen years shall be employed . . . in switch tending, gate tending or track repairing," and that any corporation or firm violating the act shall be deemed guilty of a misdemeanor and on conviction be punished by fine or imprisonment in the county jail. The plaintiff was less than eighteen years of age at the time of the accident. He was employed in a section crew whose duties were to maintain and keep in repair the section of track assigned to them. At the time of the accident this crew were proceeding in the usual way on the conveyance furnished them to a point where they were to move or "throw" the ore-loading track several feet over nearer the pile of ore, so as to facilitate the operation of loading cars. In every substantial sense this was repair of the track. It would be a very narrow construction of the statute to hold that, in order to secure its protection, an infant must at the time of his injury be actually engaged in driving a spike or lifting a rail. The purpose of the statute was to efficiently protect children from the dangers attendant upon certain extremely hazardous occupations, dangers which children do not usually appreciate. To accomplish this end it has been thought wise to make it a criminal offense for any person to employ a youth under eighteen years of age about such work. This court's duty is to give the statute full efficiency rather than to rob it of effect by narrowing its construction. The crew enters upon its work when it embarks on the handcar for the scene of repair. In every true sense it is then engaged in track repairing, and it results from this conclusion that in the present case the statute was being violated at the time of the accident.

The violation of this statute results in liability for injuries to the infant resulting therefrom regardless of the ques-

tion of contributory negligence. *Pinoza v. Northern C. Co.* 152 Wis. 473, 140 N. W. 84.

It follows from what has been said that there was really no question to go to the jury in the present case except the question of damages, and this depended, of course, upon the question of the severity and permanency of the injuries received by the plaintiff. The plaintiff fell from the handcar face downward between the rails, and his visible injuries consisted almost entirely of contusions and lacerations about the face and head. When he was picked up he was unconscious and bleeding from the mouth and nose, his wounds were dressed by a physician at the mine (who was not called as a witness), and he was then taken home and Dr. Urquhart was called and made an examination of his condition. The plaintiff was then unconscious and delirious. On the afternoon of the same day he was taken to the Twin City hospital at Ironwood, where he remained seventeen days and then returned home. He was not examined as a witness on the trial. The claim is, on the part of the plaintiff, that he has been and is an imbecile and that his imbecility is the result of the accident. On the other side the claim is that the plaintiff was simply suffering from hysteria and would probably fully recover under different surroundings. Four physicians who testified for the plaintiff and who examined the plaintiff shortly before the trial testified that in their opinion he was an imbecile, while five physicians who also examined the plaintiff and who testified for the defendant were of opinion that it was simply a bad case of hysteria.

If there was no substantial error committed in the reception of testimony upon this question, the verdict of the jury cannot be disturbed. It is vigorously claimed that there was such error. Dr. Urquhart, after testifying that he made a fairly close examination of the plaintiff when called to treat him on the day of the injury, was asked, "What did you find as to the injuries he had received?" and replied, "He had a

laceration of his upper lip, a contusion of his nose and a few small superficial contusions of the skin of his face, and according to my diagnosis a fracture at the base of the brain." The latter part of this answer, concerning the supposed fracture at the base of the brain, was duly objected to, but the objection was overruled, and this ruling is assigned as error. On cross-examination he stated that plaintiff was unconscious at the time, that his diagnosis was formed upon what he saw of the injury, the history of the accident, and the symptoms which he had, and that he got the history of the accident from some one else. The objection is made that Dr. Urquhart should not have been allowed to state that in his opinion there was a fracture at the base of the brain because that diagnosis was based in part upon a history of the accident told him by some person, and that there is no proof that such history was truthful.

The objection seems to us unsubstantial. Here was a youth unconscious, delirious, suffering from severe injuries, lacerations and contusions of the face, showing beyond question that he had fallen or been thrown on his face with violence. No credible history of the accident could have been much more or much less than this. It is not claimed or suggested that the history given to the doctor was in any respect erroneous, and it would have been very easy to find out by a single question what the history was. Were it a case where the diagnosis must necessarily be founded on symptoms extending over a series of years or even months the objection would be more substantial. It would have been better (if appellant objected to the diagnosis because the doctor had not stated the history of the accident which was furnished to him) to have required the doctor to state the history, but in a simple case of traumatic injury of this nature which must have told its own story so clearly we cannot consider the omission as substantial error.

Objection is also made that in framing a hypothetical ques-

tion addressed to the plaintiff's medical experts, as to the cause of the plaintiff's present condition, the fact that in falling from the handcar the plaintiff sustained a fracture at the base of the brain was stated as one of the facts in the case upon which the opinions of the experts were to be in part founded. If, as we have held, it was competent for Dr. Urquhart to testify that in his judgment there was such a fracture, it was competent to insert the fact in the question addressed to the experts.

We find no further claims of error which require discussion.

By the Court.—Judgment affirmed.

EMBERG, Appellant, vs. GREAT NORTHERN RAILWAY COMPANY, Respondent.

February 4—March 17, 1914.

Railroads: Injury to switchman: Unsafe place: Switch stand near track: Custom: Instructions to jury.

1. If an appliance or place of work is obviously dangerous, not even a general custom—much less, a few exceptional cases—will absolve the master from liability for an injury to a servant.
2. In an action by a switchman for injuries sustained by collision with a switch stand while he was climbing the ladder of a box car, the jury answered affirmatively a question as to whether it was customary for railroad companies having switch yards in that vicinity to locate switch stands for uses similar to those of the stand in question as close to the tracks as that stand was located. The court had instructed that this question did not inquire as to whether or not it was customary for the defendant and other railroad companies having switching yards in that vicinity to locate all switch stands of the kind and intended for similar uses as this one at the distance from the rail mentioned, but only as to whether or not it was customary for such companies, in the ordinary course of their

business, to locate some such switch stands at such distance from the rail. *Held*, that the instruction was erroneous and prejudicial because it permitted or required the jury to answer in the affirmative if some railroad companies, in the ordinary course of their business, located some such switch stands—no matter how few so there were more than one—at that distance from the rail.

BARNES and MARSHALL, JJ., dissent.

APPEAL from a judgment of the circuit court for Douglas county: FRANK A. ROSS, Circuit Judge. *Reversed.*

W. P. Crawford, for the appellant.

J. A. Murphy, for the respondent.

TIMLIN, J. In this action by a switchman against his employer for personal injuries sustained by collision with a switch stand, there were several charges of negligence in the complaint. Among them was one tendering an issue by averring the existence of a custom of placing switch stands farther from the railroad track than the switch stand upon which plaintiff was injured, which custom was known to defendant and which defendant negligently failed to observe. The jury by special verdict found the defendant guilty of want of ordinary care proximately contributing to produce plaintiff's injury by maintaining the switch stand with which plaintiff collided as it was maintained with reference to the railroad track. But the jury also found that it was customary for railroad companies having switch yards in that vicinity to locate switch stands for similar uses as close to the track as the switch stand in question. They also acquitted the plaintiff of contributory negligence. The learned circuit court changed the first answer of the jury so as to find that the defendant was not guilty of any want of ordinary care in maintaining the switch stand as it was, and allowed the other answers of the jury to stand and gave judgment for the defendant, dismissing the complaint.

It will not be necessary to notice any other assignment of

error except that relating to the instruction given with reference to the second question of the special verdict. This instruction was as follows:

"This question of course does not inquire as to whether or not it was customary for the defendant and other railroad companies having switching yards in this vicinity to locate all switch stands of the kind and intended for similar uses as this one at the distance from the rail mentioned, but only as to whether or not it was customary for such companies, in the ordinary course of their business, to locate some such switch stands at such distance from the rail."

This instruction apparently authorized the jury to answer the second question in the affirmative in case they found that it was customary for some railroad companies having switch yards in the vicinity to locate some such switch stands at the same distance from the nearest rail; that is to say, if a railroad company had one thousand switch stands of the kind in question and two were located at this distance from the rail although the customary distance as to all others was much greater, the jury nevertheless should answer the question in the affirmative. When we reflect that the real inquiry was not with reference to exceptional cases, the erroneous character of this instruction becomes apparent. If an appliance or place of work is obviously dangerous, even a general custom will not absolve the master from liability. *Nickels v. Manitowoc S. & D. D. Co.* 153 Wis. 298, 303, 141 N. W. 269; ch. 485, Laws of 1911; secs. 2394—48, 2394—49, Stats. Much less would a few exceptional cases.

It is true switch stands of a particular make or for some special purpose may be located nearer to the track than others, but that does not authorize proving a custom or manner of construction by two or three instances out of a great number, if in the case under investigation and in these two or three instances the switch stand was so close to the track that a switchman boarding a moving car at night might, in the exercise of ordinary care, collide with the switch stand. We

think the second question of the verdict was properly submitted to the jury because an issue on this point was tendered by the complaint, but that the instruction above quoted was erroneous and prejudicial, not because it failed to include all switch stands of the kind and intended for similar uses as the switch stand in question, but because it permitted or required the jury to answer this second question in the affirmative if some railroad companies, in the ordinary course of their business, located some such switch stands—no matter how few so there were more than one—at this distance from the rail.

Before taking up the trial of this case again it would be well for counsel to carefully read the decisions of the federal courts upon the scope and effect of the federal Employer's Liability Act, which seems to be covered by the complaint and to have been disregarded on the trial.

By the Court.—Judgment reversed, and cause remanded for a new trial.

BARNES, J. (*dissenting*). This court has endeavored to give effect to sec. 3072*m*, Stats., so as to carry out the purpose which it is conceived the legislature had in mind in passing it. In the numerous cases where that statute has been invoked, technical errors have been disregarded and judgments have been reversed only where it was believed that the error complained of might and probably did result in prejudice to the appellant. It will, I am sure, be taken as a truism by every one that the statute is general in its application and that plaintiffs in personal injury actions are no more immune from the operation of the law than are defendants in such actions. Courts endeavor as they should to enforce the law equally as to all, albeit they may not always accomplish the ideal. From my reading of the evidence in this case I cannot think that there is even a remote possibility that the error complained of harmed the plaintiff or had any effect on

the jury in answering the second question in the special verdict.

The error consisted in using the word "some" in the instruction quoted in the opinion of the court. The question and answer were as follows:

"(2) Was it customary for railroad companies having switch yards in this vicinity to locate switch stands for uses similar to those of switch No. 49 as close to the tracks as switch No. 49 was located? *A.* Yes."

It is said in the opinion that the jury might have answered the question as it did if the evidence showed that a railroad company had one thousand switch stands and two of them were located as close to the track as was the one which injured the plaintiff.

The evidence showed that the base of the switch stand which injured the plaintiff was four feet and six inches from the outside of the rail, and that the clearance was four feet three inches. The defendant offered no evidence to show that this distance was the customary and usual one as to a few of its yard switches or as to a few dozen of them or as to a few hundred of them. It did not offer a shred of testimony in relation to isolated cases except as will be hereafter noted. The testimony of its witnesses further showed that it used three practically uniform standards and that such standards were the ones that were commonly in use by railroad companies generally. Crown or stub switches usually have a clearance of three feet three inches. These switches have no upright arm, so they could not injure a man riding on the side of a box car. The standard switch for use in yards, as above stated, has a clearance of four feet three inches between the switch standard and the rail at the nearest point. The third class of switches is what is known as main-line switches, and the clearance between the nearest point of these switches and the outside of the rail on the Great Northern road is five feet three inches. We are not particularly con-

cerned with either the main-line switch or the stub switch in this case. Now the yard switches, according to the testimony of the defendant, which are not built in accordance with this standard, are those on curves and where the character of the ground is such that the switch cannot be placed at this distance. The testimony showed, for instance, that as to switch No. 50, which was on a curve, the distance was one foot greater than the standard distance. The reason for this is of course obvious,—the clearance at either end of a car might not be as great as if the track were straight. Switch No. 43 was also a foot further from the rail than the standard distance, because if it were placed at the standard distance it would be in a culvert.

Mr. Donley, the general roadmaster of the *Great Northern Railway Company,* testified to these standards very fully, and furthermore that these standards are generally in use by the railroads of the country and that the clearance was the same; that the switch rods were interchangeable. He further testified that there were forty miles of track in the Great Northern yards at Superior, and the other evidence is to the effect that there were hundreds of switches in this yard.

Peter Jensen, the assistant roadmaster of the same road, testified to substantially the same state of facts. So did Flynn, the roadmaster of the defendant at Superior. So did Mealy, section foreman at Superior. O'Bevan, switchman for the defendant, testified to substantially the same state of facts. This witness further testified that he had worked in the Burlington yards, the Milwaukee yard at Chicago, and in the terminal yard at St. Louis; that while he didn't measure the distance the switches were from the track, in his judgment the distance was the same as in the Great Northern yard at Superior. Wedemeir, a member of the switching crew at the time plaintiff was injured, testified that he measured the clearance between the rail and switch No. 49, and he corroborates the testimony of the other witnesses. He further

testified that he observed the distance that various switches in various parts of the yard were from the track, and that this switch 49 was the same distance as the other switches generally throughout the various yards. Oliver, the night foreman, testified that the switches of the character of the one on which plaintiff was hurt were about the same distance from the track. Mehan, yardmaster of the Duluth, Missabe & Northern Railway Company, which operates a very large switching yard at or near Duluth, testified that the uniform distance of the switches in their yard from the nearest rail was four feet four inches, and that such switches were in general use in other yards. Also that the switch used by their company was a standard switch and in general use in that part of the country. Thompkins, yardmaster for the Terminal Company, which operates large switching yards in Superior, testified that there was a standard distance for switch stands in yards; that such standard distance was four feet six inches with a clearance of four feet three inches. He gave the same testimony in reference to stub switches and main-line switches that was given by the other witnesses referred to. Wells, general trainmaster for the Omaha road, testified that he had been in the railroad service for twenty-two years, worked for the Great Northern, Northern Pacific, Missouri Pacific, Union Pacific, Great Western, and Omaha roads, and that he had been in the Superior service about three years and was familiar with the switches in the yards and the distances from the same to the tracks on the various railroads generally; that all railroads have a standard uniform distance for switches from the rail; that he was familiar with switch 49 on the Great Northern and that it conformed to the standard generally in use on railroads where the same service was being done as was done by switch 49.

We now turn to plaintiff's evidence. The plaintiff himself testified that the customary distance to place switch stands

from the track at the head of the lakes was six feet. Lapier said that the distance of high switch stands from railroad tracks in yards generally was five to six feet, and that switch 49 was closer to the track than other switches in the Great Northern yard. Hoeffner testified that the standard distance was between five and six feet. Vincent probably intended to testify to the same state of facts, although it appears quite satisfactorily from the evidence that his testimony related to main-line switches, principally at least.

All of this testimony was directed to the customary distance of placing switch stands from the rail in switching yards. The court evidently was of the opinion that the testimony of the plaintiff and of the witnesses Lapier, Hoeffner, and Vincent raised an issue as to what the customary distance was, and hence submitted question 2 to the jury. I think I have not overlooked any testimony of any importance bearing on the customary distance of locating switch stands from the nearest rail in switching yards. The plaintiff, however, caused some measurements to be made of switches in a few isolated cases in some of the yards and had the witnesses who made the measurements testify. The witnesses Gormley and Cressette measured four switches in the Great Northern yard, four in the yard of the Terminal Company, three in the Northern Pacific yard, two in the South Shore yard, two in the Soo yard, one at the crossing of the Great Northern and Northern Pacific, and also some switches in the Omaha yard, no data in reference to which are given. Vincent measured five switches in the yard of the Terminal Company and some in the South Shore yard, the number not being given. Daoust measured five switches in the yard of the Duluth, Missabe & Northern Railway. Some of these switches were unquestionably main-line switches, but it is difficult to tell how many. The distance found varied from five feet six inches to seven feet one inch, with the exception

of one switch in the Great Northern yard, where the distance was found to be three feet eight and one-half inches; it does not appear whether this was a stub switch or not.

It will be observed that these measurements show that all of the switches measured, with one exception, were further from the rail than was switch 49, and further than the standard distance for yard switches as testified to by most of the witnesses. If the testimony in reference to the measurements made of a few isolated switches, among the thousands in the Superior and Duluth yards, was material for any purpose, it was in connection with some general statements made that no difference was noticed between the switches measured and those which were not, so that such measurements indicated that the standard distance was greater than that testified to by the defendant's witnesses. If it had any other possible bearing, it must have been to show a different standard from that testified to by defendant's witnesses and by some of the witnesses for the plaintiff. By no possibility could this testimony be of any aid to the plaintiff in securing an affirmative answer to the second question, because in every single instance but one the distance testified to was greater than was the distance between switch 49 and the rail.

So we have the evidence of defendant's witnesses and of some of plaintiff's as well, ten in number in all, that switch 49 was a standard switch placed at the usual and customary distance from the track for yard switches. This evidence was given for the most part by men who either made actual measurements or who knew what the fact was. It applied not to a few isolated switches, but to the hundreds if not thousands of switches in the yards of Superior and Duluth. In the exceptional cases mentioned the switches were further from the rails. We have the evidence of the plaintiff's witnesses that switch 49 was not placed the customary distance from the rail, because such distance was from five to six feet, and this raised the issue which the jury was called upon to

decide. There was no dispute as to how far switch 49 was from the rail. Aside from the evidence relating to the customary distance, there was the evidence referred to of measurements made of a few switches in several of the yards. That testimony could not benefit the defendant, because, except as to a single switch, the distances found were greater than the standard claimed by defendant. The defendant's whole defense rested on the proposition that there was a uniform standard for yard switches and that switch 49 belonged to that standard. There was abundant, in fact well nigh overwhelming, evidence to support this proposition. There was no evidence that switch 49 was in a small class by itself. Should this court say that the jury disbelieved the array of witnesses who testified in defendant's behalf on this point and answered the question as it did because of the court's instruction which had no substantial support in the evidence? What the court evidently intended to tell the jury was that it was not necessary that all switches should be placed at a uniform distance from the rail in order to warrant an affirmative answer to the second question.

I think that the instruction, looking at it from any viewpoint, was harmless and that the defendant was entitled to the benefit of the verdict and that the decision in this case is a backward step in the administration of the law.

It is very probable that under the facts shown in this case either party had the right to insist that the federal law was applicable to it. Neither party requested that it be tried under such law, and under the *Leora* and *Hanson Cases,* decided herewith, the right was waived as to the trial already had.

MARSHALL, J. I concur in the foregoing opinion of Mr. Justice BARNES.

GROGAN, Respondent, vs. WISCONSIN SUGAR COMPANY, Appellant.

February 6—March 17, 1914.

Appeal: Affirmance: Disagreement in appellate court.

Where a majority of the members of this court are not in accord as to any ground for reversal, a judgment will be affirmed.

APPEAL from a judgment of the county court of Waukesha county: DAVID W. AGNEW, Judge. *Affirmed.*

Action to recover on two written contracts, whereby plaintiff became obligated to plant a stipulated number of acres to sugar beets, cultivate and harvest the same in good husbandlike manner, and deliver the matured crop to the defendant in good condition. The latter, in consideration of performance on plaintiff's part, agreed to pay him at a stipulated rate for beets delivered. Plaintiff claimed that, at the time of making the written contracts, defendant verbally agreed to furnish him experienced and sufficient help to seasonably do that part of the work required in producing the beet crop, called hand work, such as thinning, hoeing, pulling, topping, bunching, piling, and covering the beets, and made it as an inducement for plaintiff to crop his land to beets as agreed in writing, and that, though plaintiff fully performed all obligations incurred by him, defendant breached its verbal promise to his damage in the sum of $350. Defendant answered putting the allegations as to the verbal agreement, the breach thereof, and damages in consequence thereof in issue and pleaded a counterclaim of $85.53. The counterclaim was duly replied to.

There was evidence of the making of the verbal contract as alleged, a breach thereof, and damages thereby caused to plaintiff around $300. There was also evidence, showing or tending to show, that defendant, by conduct from the beginning to the end of the period for performance between the

parties, recognized the existence of its promise to furnish the labor to do the so-called hand work. The counterclaim was admitted on the trial to the extent of $33.75. The jury in due form found in plaintiff's favor on all issues and assessed his damages at $264, after deducting the $33.75 admitted to be due defendant on its counterclaim. Judgment was rendered accordingly.

For the appellant there was a brief by *Frame & Blackstone,* and oral argument by *A. L. Blackstone.*

For the respondent there was a brief by *Merton, Newbury & Jacobson,* and oral argument by *M. A. Jacobson.*

MARSHALL, J. The rule as to disposition of a cause in case of there not being a majority of the members of the court in accord as to any ground for reversal requires the judgment in this case to be affirmed and renders filing of an opinion unnecessary, if not inadvisable.

By the Court.—Judgment affirmed.

HARLAND, Respondent, vs. WISCONSIN SUGAR COMPANY, Appellant.

February 6—March 17, 1914.

APPEAL from a judgment of the county court of Waukesha county: DAVID W. AGNEW, Judge. *Affirmed.*

Action to recover on contract. Judgment was in due form for $344.71.

For the appellant there was a brief by *Frame & Blackstone,* and oral argument by *A. L. Blackstone.*

For the respondent there was a brief by *Merton, Newbury & Jacobson,* and oral argument by *M. A. Jacobson.*

MARSHALL, J. The same questions are presented in this case as in *Grogan v. Wisconsin S. Co., ante,* p. 406, 146 N. W. 491, and following the rule of that case the judgment must be affirmed.

By the Court.—Judgment affirmed.

PROCHNOW and wife, Appellants, vs. NORTHWESTERN IRON COMPANY, Respondent.

February 6—March 17, 1914.

Appealable orders: Amendment of pleading: Parties: Husband and wife: Action for nuisance damaging husband's realty.

1. An order permitting an answer to be amended so as to set up the statute of limitations and also a plea in abatement, is not appealable.
2. An order in such case sustaining the plea in abatement and dismissing the complaint as to one of the plaintiffs is appealable, but an appeal therefrom does not bring up for review the order permitting the answer to be amended.
3. A wife is not a proper party plaintiff in an action by her husband to recover damages for and to abate a nuisance affecting his real property in which she has no separate estate, even though such real property is his homestead.
4. The fact that money advanced by the wife to her husband went into the property is immaterial in such case, where no trust resulted in her favor and the whole title remains in the husband.

WINSLOW, C. J., and MARSHALL and VINJE, JJ., dissent.

APPEAL from orders of the circuit court for Dodge county: MARTIN L. LUECK, Circuit Judge. *Dismissed as to one order; the other affirmed.*

This action was brought by the plaintiffs *Gustav Prochnow* and *Matilda Prochnow,* his wife, to recover damages for the maintenance of an alleged nuisance and to abate the same. The action was commenced September 16, 1911. October 10, 1911, the defendant answered. Afterwards on motion the defendant was permitted to amend its answer by setting up a defense of the statutes of limitation, and also a separate defense by way of answer in abatement as against the plaintiff *Matilda Prochnow* as a supplemental answer. The issue by way of answer in abatement was afterwards heard and the answer sustained by the court, and an order made accordingly. The plaintiffs appealed from the two orders, namely,

(a) the order allowing the amendment setting up the statutes of limitation and answer in abatement; and (b) the order sustaining the answer in abatement.

For the appellants there was a brief signed by *J. E. & J. F. Malone,* and oral argument by *F. L. McNamara.*

For the respondent the cause was submitted on the brief of *Flanders, Bottum, Fawsett & Bottum,* attorneys, and *Paul O. Husting,* of counsel.

KERWIN, J. 1. Counsel for appellants contend that the court should not have allowed the amendment setting up the statutes of limitation, nor the amendment setting up the answer in abatement as to plaintiff *Matilda Prochnow,* and argue the question under this head to considerable extent in their brief. We are, however, precluded from considering the error assigned under this head for the reason that the first order is not appealable. Sec. 3069, Stats., provides what orders may be carried by appeal to the supreme court, and the order in question does not come within any provision of this statute.

The answer in abatement set up facts to the effect that the plaintiff *Matilda Prochnow* was not a proper party plaintiff, and upon the trial of this issue the court ordered that the plea in abatement be sustained, and that the complaint, in so far as any cause of action or claim for damages was attempted to be stated therein in favor of the plaintiff *Matilda Prochnow,* be dismissed, and that she be dismissed from said action as a party thereto, but without prejudice to the right of the plaintiff *Gustav Prochnow* to proceed in the action as plaintiff. This latter order is appealable, but the appeal from such order does not bring up for review the first order referred to. *Gross C. Co. v. Milwaukee,* 148 Wis. 72, 134 N. W. 139; *Gorsegner v. Burnham,* 142 Wis. 486, 125 N. W. 914; *Linden L. Co. v. Milwaukee E. R. & L. Co.* 107 Wis. 493, 83 N. W. 851; *Breed v. Ketchum,* 51 Wis. 164, 7 N.

W. 550; *Wis. R. E. Co. v. Milwaukee,* 151 Wis. 198, 138 N. W. 642. It is clear from the statute referred to and the decisions of this court that the first order mentioned is not before us for review, hence its merits cannot be considered.

2. The issue on the answer in abatement was tried before the court and a bill of exceptions settled on appeal. The court below found on sufficient evidence that the plaintiff *Matilda Prochnow* never had any right, title, or interest in the real estate described in the complaint, except such right, title, or interest as she might have by virtue of being wife of the plaintiff *Gustav Prochnow,* and that said *Matilda Prochnow* had no separate estate in said real estate described or otherwise, and was in no way affected by the alleged nuisance referred to in the complaint. Upon these facts, supported by the evidence, it is clear that she was not a proper party plaintiff in this action. At common law the wife is not a proper party to an action for damages to her husband's realty or personal property. Our statute, sec. 2345, does not make her a proper party in this action. It gives her the right to sue in her own name in actions relating to her separate property or business, or to sue for an injury to her person or character, or for the alienation and loss of the affection and society of her husband, and also in other respects mentioned in secs. 2343 and 2344, which do not touch the instant case. The case at bar does not come within any of the statutory provisions permitting a married woman to sue; nor does the fact that the real estate in question is the homestead of the plaintiff *Gustav Prochnow* confer any right upon the plaintiff *Matilda Prochnow* to join with her husband in this suit. *Mash v. Bloom,* 126 Wis. 385, 105 N. W. 831; *Town v. Gensch,* 101 Wis. 445, 76 N. W. 1096, 77 N. W. 893; *Beranek v. Beranek,* 113 Wis. 272, 89 N. W. 146. The case of *Hufnagel v. Mount Vernon,* 49 Hun, 286, 1 N. Y. Supp. 787, is in point on the proposition under consideration to the effect that a wife is not a proper party plaintiff in an action

by the husband to recover damages to real property by the alleged maintenance of a nuisance. This court has held that the wife is an improper party plaintiff with her husband in an action to set aside a conveyance of their homestead on the ground that the same was induced by fraud. *Read v. Sang,* 21 Wis. 678. The present action to recover damages for and to abate the nuisance is an action at law. *Remington v. Foster,* 42 Wis. 608. It is based on ownership of the property injured. Wood, Nuisances (3d ed.) § 495; *Kavanagh v. Barber,* 131 N. Y. 211, 30 N. E. 235.

The ownership and possession of the real estate being in the plaintiff *Gustav Prochnow,* the right of action was in him exclusively. *Kavanagh v. Barber, supra; Hufnagel v. Mount Vernon,* 49 Hun, 286, 1 N. Y. Supp. 787. We think it clear upon principle and authority that the wife was an improper party plaintiff in the present action, therefore the court below was right in sustaining the answer in abatement and dismissing the plaintiff *Matilda Prochnow* from the case. It is true there is a class of cases where the wife is a proper party where necessary in an action to protect her dower interest, but such cases have no bearing here. *Madigan v. Walsh,* 22 Wis. 501, holds that an inchoate right of dower is such an interest in land as will enable the wife to maintain an action to remove a cloud fraudulently attempted to be created upon it.

Counsel for appellant refers us to *Hausmann Bros. Mfg. Co. v. Kempfert,* 93 Wis. 587, 67 N. W. 1136, and *Huntzicker v. Crocker,* 135 Wis. 38, 115 N. W. 340. In the former case it was simply held that the wife was a proper, if not a necessary, party in an action to foreclose a mechanic's lien, even though the premises were not the homestead, and even though her inchoate right of dower could not be divested in such action. In the *Huntzicker Case* it was held that an inchoate right of dower is such an incumbrance on land as will entitle its owner to maintain an action to remove a cloud thereon

under sec. 3186, Stats. It is obvious that neither of these cases reaches the question before us.

It is further contended that $500 or $600 of *Matilda Prochnow's* money went into the land in question, hence she has an interest therein. This contention is without merit, even if it be true that she advanced money to her husband which money went into the property. The whole title to the property still remains in *Gustav Prochnow,* and upon the established facts in this case no trust results in favor of *Matilda Prochnow. Friedrich v. Huth,* 155 Wis. 196, 144 N. W. 202. It follows that the appeal must be dismissed as to the first order appealed from, and that the second order must be affirmed.

By the Court.—The appeal is dismissed as to the first order, and the second order appealed from is affirmed.

VINJE, J., dissents.

The following opinions were filed April 17, 1914:

WINSLOW, C. J. (*dissenting*). To my mind it is very plain that the court has fallen into error in this case.

The opinion of the court denominates the present action as an action at law to recover damages for, and procure the abatement of, a nuisance which injures the value of real estate owned by the husband alone. If this were the fact I might perhaps have no quarrel with the result reached. As matter of fact, however, the complaint contains all the allegations necessary to set forth an action in equity under the provisions of the latter part of sec. 3180 of the Statutes to enjoin the continuance of a nuisance consisting of noises and noxious smells produced by defendant's furnaces by night and day, which, as alleged, render the homestead of the parties unfit for habitation and seriously impair the health and comfort of the parties. True, there are also allegations of injury to the

value of the homestead, which, it appears, is owned by the husband alone. These allegations, however, ought not in reason to be held to fix the character of the action as one purely at law, but rather they should be considered as merely incidental to the equitable relief sought by way of prevention of the constantly recurring noises and smells which are impairing the health and comfort of the parties. To sum the whole matter up, it may be said that all the allegations are here present necessary to state a complete cause of action in equity in favor of the wife for the enjoining of a constantly recurring nuisance which is affecting her health and for which she has no remedy at law. When did it come to be the law that a married woman may not bring such an action? When did it come to be the law that the court will be industrious to narrow the allegations of the complaint in order to make it a complaint in an action at law to which one of the plaintiffs would not be a proper party, when it contains every allegation essential to a perfectly good complaint in equity in favor of both plaintiffs? When these questions are satisfactorily answered, I shall perhaps be prepared to agree with the result reached here, but not before.

MARSHALL, J. (*dissenting*). I unite with the Chief Justice and Justice VINJE in dissenting in this case. I think the reasoning in the court's opinion violates the basic principles of our jurisprudence, that "there is no wrong without a remedy." It violates one of the most vital principles of the Code that "All persons having an interest in the subject of the action and in obtaining the relief demanded may be joined as plaintiffs, except as otherwise provided by law." Sec. 2602, Stats. It violates one of the crowning features of the Code that "In the construction of a pleading for the purpose of determining its effect its allegations shall be liberally construed, with a view to substantial justice between the parties." Sec. 2668, Stats.

I think that to condemn the complaint as to *Mrs. Prochnow* because it does not show that she has any interest in the subject of the litigation, is to take a peculiarly technical view of the wrong complained of,—one which does violence to common-law rules, saying nothing about the broad liberal rules of our statutory system.

Why say, in effect, that the subject of the action is the real estate and *Mrs. Prochnow* has no interest therein,—the whole is in her husband? Technically such is the legal title but to all intents and purposes the home is community property. It cannot be sold or incumbered in any way without a conveyance of some sort executed by husband and wife. It is her home just as much as it is his. She has just as much interest in preserving its habitable quality as he. If there is any difference it is in her favor. Therefore the doctrine that only a person interested in the real estate can maintain an action for an injury thereto, it will be seen, has no application in favor of the defendant when the real nature of the action is appreciated.

It rather shocks one's sense of justice to face a decision that a married woman has no such interest in the realty, which is partly hers for all practical purposes because it is the homestead of herself and husband, which will enable her to prosecute to prevent a violation of her right to enjoy it. True this court at quite an early day held that a married woman's estate in the home is solely prospective and depends on the disability of the husband to deal with it without her consent, evidenced by her deed. I apprehend that if the court had to deal with the matter unhampered by precedent it would give a far greater dignity to her right. That is well indicated in *Town v. Gensch,* 101 Wis. 445, 449, 76 N. W. 1096, 77 N. W. 893; but to go to the length of holding that she cannot protect her right of enjoyment against acts detrimental to her right of personal security and immunity from undue annoyances, is

to extend the doctrine which in *Town v. Gensch,* it was said, would not be done.

Some justification of the decision is made upon the ground that an action for a nuisance as affecting real estate is an action at law. But has not this court said over and over again and does not the Code declare that there is no distinction in our system between actions at law and actions in equity, except as to mode of trial? True an action for damages for a nuisance is an action requiring a jury trial unless the right thereto is waived; but that only applies where the primary relief sought is damages. Such is not the case now. The primary right here which has been violated is that of enjoyment of the home under normally habitable conditions, and the primary relief sought is prevention of further invasion thereof. The claim for damages is purely incidental.

The whole reasoning of the court seems to be faulty in that it treats the subject of the action as real estate; while the real subject is the security and use of the real estate for a home. The violated right is as much that of *Mrs. Prochnow* as of her husband.

The foregoing would seem in striking contrast with the decision of the court if the citations of authority there were not examined. When examined it will be seen that some of them do not deal with the question here and others support this dissent. *Mash v. Bloom,* 126 Wis. 385, 105 N. W. 831, was not an action to protect the homestead right. It was an action against a married woman to vacate a deed under which the homestead was acquired, and it was said that the wife, though a proper, was not a necessary party, because a judgment against her alone would not be conclusive as to any widow's right which she might at some time in the future acquire. It is easy to see how variant that is from an action to prevent impairment of the present habitability of a home. *Hunt v. McDonald,* 124 Wis. 82, 102 N. W. 318, is to the

same effect. *Town v. Gensch,* 101 Wis. 445, 76 N. W. 1096, 77 N. W. 893, involved the validity of a deed of a homestead which was not signed by the wife. The question decided does not seem to bear even remotely on the case here. In *Hufnagel v. Mount Vernon,* 49 Hun, 286, 1 N. Y. Supp. 787, where it was said the whole right was in the husband, the claim in controversy was for damages for an injury to the realty. The gist of the action was the damages. Here, as said before, the gist of the action is the safe, continued habitability of the home. No damages are claimed except as incidental to the primary right to injunctive relief.

It seems that the court proceeded from an entirely wrong standpoint in rendering the decision. I cannot think it was not appreciated that the key to the logic in support of the result is that the action is for damages to the realty as the primary thing, while the dominant idea, in fact, throughout the complaint was preventive relief and the prayer was in harmony therewith. The court, or the writer of the opinion, must have been misled by decisions under sec. 3180 prior to the amendment of 1882. As that formerly stood the remedy in equity for a nuisance was abolished; but it was restored by the amendment, as its language clearly indicates and as this court has held. *Stadler v. Grieben,* 61 Wis. 500, 505, 21 N. W. 629. In that case the court decided, according to elementary principles, and the spirit of the statute that an action to abate a wrong injurious to health and comfort is just as legitimate as one injurious to property, saying, in effect, it is well settled that the law gives to every person protection against every substantial injury. Let the injury be tangible, or the discomfort perceptible to the senses of ordinary people . . . and an action accrues, either in law or in equity to remedy the wrong. That has been repeatedly approved in actions such as this, all being treated as equitable interferences. *McCann v. Strang,* 97 Wis. 551, 72 N. W. 1117; *Middlestadt v. Waupaca S. & P. Co.* 93 Wis. 1, 66 N. W.

713; *Rogers v. John Week L. Co.* 117 Wis. 5, 93 N. W. 821. *McCann v. Strang, supra,* was precisely like this case. Husband and wife joined as plaintiffs. That having been several times referred to, doubtless was followed by the pleader in this case.

I apprehend that this court will not be content to long rest under the imputation of having put injuries to mere property above injuries to health and comfort, particularly the health and comfort of married women and their families. There is no such infirmity in the law. The present result is an infirmity in administration, not in the law. No court has more significantly than ours vindicated the maxim "There is no wrong without a remedy." Can it be consistent with that to hold that a married woman suffers no remediable wrong by her home being rendered uninhabitable and her health and comfort jeopardized because, forsooth, she has no legal title to the property?

The very reference I have made to the sources of the court's logic, I think, plainly exhibits and refutes the error of it. We may freely concede that a person who has no present interest of a strictly legal nature in realty cannot maintain an action for damages to the property by the maintenance of a nuisance as was held in *Kavanagh v. Barber,* 131 N. Y. 211, 30 N. E. 235, and is laid down as elementary in 2 Wood on Nuisances (3d ed.) § 832*a*. We may also concede that courts, at times, have confused that with the question of whether an action will lie for equitable relief against a nuisance, and that is particularly true where the old remedy for relief in equity has been abolished. But it is all a matter of administration. This court has not, before, lapsed into such confusion as is evidenced by the cases cited, particularly *McCann v. Strang.* Courts of equity are not bound by precedents. Where there has been a tendency to administer the law in equity, as if the court were in a straight-jacket, so to speak, wrought out for it by precedents, the modern effort

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WINSLOW, C. J., and MARSHALL and VINJE, JJ., dissent.

APPEAL from orders of the circuit court for Dodge county: MARTIN L. LUECK, Circuit Judge. *Dismissed as to one order; the other affirmed.*

This action was brought by the plaintiffs *Gustav Prochnow* and *Matilda Prochnow,* his wife, to recover damages for the maintenance of an alleged nuisance and to abate the same. The action was commenced September 16, 1911. October 10, 1911, the defendant answered. Afterwards on motion the defendant was permitted to amend its answer by setting up a defense of the statutes of limitation, and also a separate defense by way of answer in abatement as against the plaintiff *Matilda Prochnow* as a supplemental answer. The issue by way of answer in abatement was afterwards heard and the answer sustained by the court, and an order made accordingly. The plaintiffs appealed from the two orders, namely,

(a) the order allowing the amendment setting up the statutes of limitation and answer in abatement; and (b) the order sustaining the answer in abatement.

For the appellants there was a brief signed by *J. E. & J. F. Malone,* and oral argument by *F. L. McNamara.*

For the respondent the cause was submitted on the brief of *Flanders, Bottum, Fawsett & Bottum,* attorneys, and *Paul O. Husting,* of counsel.

KERWIN, J. 1. Counsel for appellants contend that the court should not have allowed the amendment setting up the statutes of limitation, nor the amendment setting up the answer in abatement as to plaintiff *Matilda Prochnow,* and argue the question under this head to considerable extent in their brief. We are, however, precluded from considering the error assigned under this head for the reason that the first order is not appealable. Sec. 3069, Stats., provides what orders may be carried by appeal to the supreme court, and the order in question does not come within any provision of this statute.

The answer in abatement set up facts to the effect that the plaintiff *Matilda Prochnow* was not a proper party plaintiff, and upon the trial of this issue the court ordered that the plea in abatement be sustained, and that the complaint, in so far as any cause of action or claim for damages was attempted to be stated therein in favor of the plaintiff *Matilda Prochnow,* be dismissed, and that she be dismissed from said action as a party thereto, but without prejudice to the right of the plaintiff *Gustav Prochnow* to proceed in the action as plaintiff. This latter order is appealable, but the appeal from such order does not bring up for review the first order referred to. *Gross C. Co. v. Milwaukee,* 148 Wis. 72, 134 N. W. 139; *Gorsegner v. Burnham,* 142 Wis. 486, 125 N. W. 914; *Linden L. Co. v. Milwaukee E. R. & L. Co.* 107 Wis. 493, 83 N. W. 851; *Breed v. Ketchum,* 51 Wis. 164, 7 N.

out by a lever. Over the rolls was stretched a piece of canvas called the drier felt, over which the paper ran as it went through the machine. The felt on the rollers was held in place by small counter rolls between the large rolls. A large open framework covered the sides of the machine, and in this framework were the journals for the hubs of the rolls. The machine stood east and west in a room 120 by 40 feet, with a considerable space to the north side. It was necessary for the plaintiff, in fixing this broken stick, to measure its length. To do this he procured a small stick about nine feet long and one-fourth inch by three-eighths inch thick. The machine stands about eighty-four inches high and is about 104 inches across. The drier rolls are eighty-eight inches long and are placed five and one-half inches apart. Between these are the felt or counter rolls, which are ninety-six inches long, four and one-half inches in diameter, and the space between these and the drier rolls is about one inch. The guide stick which the plaintiff was to measure and replace was about five inches above the frame and ninety inches from the floor, and extends across the machine.

At the time of the accident the machine was running, but no paper was going through it. After being told to fix the broken guide the plaintiff procured the above described stick and mounted the frame of the machine to take the measurement of the length of the broken guide stick. He called to one of the men working on the other side of the machine to help him take the measurement. This man mounted a platform which ran along on the south side of the machine and took the stick as plaintiff passed it to him and placed it flush with the end of the broken guide, while the plaintiff marked the length of it at the other end. The plaintiff was standing with his right foot on the frame of the machine at the point marked 5 in the accompanying illustration, his left foot on the journal of the roll just below the point 5 and thirty-six inches from the floor, his left hand and arm thrown over the top of

the frame marked at A, and was taking the measurement of the guide stick marked 1. After the plaintiff had marked the length of the stick with his finger he told his helper to push the stick back and let go. The helper did so, and as he let go the stick dropped down onto the felt running under the counter rolls, snapped off near the end plaintiff held, leaving a piece about nine inches long in his hand, and the balance of the stick went in between the counter and drier rolls and broke into small pieces. *Langos* then turned to the right and took his right foot from its position on the frame and placed it on the projection of the frame some twenty-seven inches from the floor. He then turned and was looking for a place to put his left foot, which he had removed to a hanging position. He would, while looking for a place for his left foot, naturally turn to the left in so doing. While in this position his hand and arm came in contact with the moving felt and were drawn into the space between the counter roll and the hot drier roll at the point marked D in the illustration, and so injured him as to necessitate amputation above the elbow. Plaintiff cried out as he was injured, and Mr. Smith, the manager, and a Mr. Jensen, a machine tender, seized the lever and shut down the machine. Torsrud, the superintendent, removed the journal of the counter roll and freed his arm.

The three machine men and the superintendent were the only persons having authority to stop the machine for repairs or any other purpose, and upon call from the plaintiff to stop the machine it was their duty to do so. The machine was running when Torsrud, the superintendent, told *Langos* to fix the stick, and neither Torsrud nor any one else stopped the machine while the repairs were being made. The manager, Mr. Smith, was near the place where plaintiff came to mount the frame and remained there up to the time of the accident. The plaintiff had spoken to the superintendent about building a platform on the north side of the machine upon which to stand while doing any work about the machine, but was told

it was not necessary. There was in the room, and not far from the plaintiff at the time he mounted the machine frame to make the repair, a saw horse thirty-seven and one-half inches high, made of 4 x 4, and a crossbar made of 4 x 6, and the top face was four inches wide. The spread of the legs is less than forty-five degrees. The defendant claims that it would have been practicable for the plaintiff to have used this horse in making this measurement, while the plaintiff claims it would have been impossible to balance one's self and reach in over the top of the frame from the top of this horse; and that this horse was never used for any such purpose and that no suggestion for such use of it was ever made to him.

The plaintiff was confined to the hospital for some four weeks and suffered great pain and agony from this injury, and has ever since been obliged to go to the hospital for treatment and cannot follow his occupation as millwright. His wife and three children, aged four, six, and fourteen years respectively, are dependent on him for support.

The questions of the special verdict put to the jury and answered by them were as follows:

"(1) Did the defendant furnish *Langos* a place of employment in which to perform his duties which was safe? *A.* No.

"(2) If you answer question No. 1 'No,' then was the failure of the defendant to furnish a place which was safe the proximate cause of plaintiff's injuries? *A.* Yes.

"(3) Was the plaintiff guilty of any want of ordinary care which contributed proximately to his injuries? *A.* No.

"(4) What sum will reasonably compensate plaintiff for the injuries he received? *A.* $4,500."

Judgment was entered on the verdict in favor of the plaintiff and against the defendant for the sum of $4,655.26 damages and costs, from which judgment the defendant appeals.

For the appellant there was a brief by *Doe & Ballhorn* and *Wm. F. Shea,* and oral argument by *J. B. Doe.* As to defendant's duty and liability, they cited *Tallman v. Chippewa S. Co.* 155 Wis. 36, 143 N. W. 1054; *Sparrow v. Menasha*

P. Co. 154 Wis. 459, 143 N. W. 317; *Lueckel v. Preston,* 154 Wis. 429, 143 N. W. 173; *Priebe v. Hirsch,* 155 Wis. 181, 144 N. W. 287; *Montevilla v. Northern F. Co.* 153 Wis. 292, 141 N. W. 279; *Johnson v. Webster Mfg. Co.* 139 Wis. 181, 120 N. W. 832; and other cases. And upon the question of plaintiff's contributory negligence: *Hart v. Neillsville,* 141 Wis. 3, 123 N. W. 125; *Schultz v. C., M. & St. P. R. Co.* 116 Wis. 31, 92 N. W. 377; *Hansen v. Milwaukee C. & G. Co.* 155 Wis. 235, 144 N. W. 289; *Pierson v. Citizens' T. & T. Co.* 141 Wis. 117, 123 N. W. 642; *Schultz v. C. C. Thompson L. Co.* 91 Wis. 626, 65 N. W. 498; *Gossens v. Mattoon Mfg. Co.* 104 Wis. 406, 80 N. W. 589; *Bigelow v. Danielson,* 102 Wis. 470, 78 N. W. 599; *Gardner v. Paine L. Co.* 124 Wis. 338, 101 N. W. 700; *Hynes v. Holt L. Co.* 147 Wis. 172, 132 N. W. 889; *Houg v. Girard L. Co.* 144 Wis. 337, 129 N. W. 633; *Noetzel v. A. George Schulz Co.* 148 Wis. 106, 134 N. W. 381.

For the respondent there was a brief by *Sanborn, Lamoreux & Pray,* and oral argument by *A. W. Sanborn.*

SIEBECKER, J. The defendant contends that the trial court erred in denying its motions for a nonsuit and for a direction of the verdict in its favor, upon the grounds that the evidence in the case shows that the defendant furnished plaintiff a safe place of employment and that it adopted and used such methods and processes as were reasonably adequate to render his employment and place of employment safe. The statutes governing the case are embraced in ch. 485, Laws of 1911. The section of this chapter which controls the rights of the parties has been considered in recent cases, and we refer to the case of *Rosholt v. Worden-Allen Co.* 155 Wis. 168, 144 N. W. 650, for an exposition of those parts that are applicable here. It is there declared:

"Said ch. 485 is applicable beyond any doubt to all employees and all employers in this state, excepting only such as

are expressly exempted from its operation. Sec. 2394—48 requires every employer, among other things, to furnish a place of employment *'which shall be safe for employees.'* Sec. 2394—49 provides that no employer *'shall require, permit or suffer* any employee to go or be in any employment *or place of employment* which is not safe.' Sec. 2394—41 provides that 'the term "safe" and "safety" as applied to an employment or a place of employment shall mean such freedom from danger to the life, health or safety of employees . . . as the nature of the employment will reasonably permit.' "

It is also declared in that case that these sections, in connection with others there cited, "make some radical changes in the common law as it existed when the act was passed," and that "the statute in terms imposes an absolute duty upon the employer to make the place of employment as free from danger as the nature of the employment will reasonably permit, and in the absence of contributory negligence the liability of the master follows as a matter of course if this duty is not performed and injury results to the employee because it is not performed." See, also, *Tallman v. Chippewa S. Co.* 155 Wis. 36, 143 N. W. 1054. The jury found that the defendant failed to furnish plaintiff a place of employment in which to perform his duties in making the repair on the paper machine which was safe, and that this failure on its part proximately caused the plaintiff's injuries. The trial court held that the evidence sustained these findings. The question is, Did the court err in holding that the evidence in the case sustains these findings? It is alleged that defendant failed to furnish the plaintiff a safe place of employment and that it required, permitted, and suffered him to go and be in a place of employment which was not safe because the paper machine was not stopped while plaintiff was required to repair the guide board, or felt guide, as described in the foregoing statement. This statement shows the nature of the repair the plaintiff was engaged at; the condition of the place on the machine where he stood; the method employed to perform

this duty while the machine was running. It appeared that the superintendent, under whom the plaintiff worked, discovered that the felt guide was out of repair shortly after the machine was started in the morning and that it required repair before any paper could pass through the machine, and that he directed the plaintiff to make the repair. Following this direction of the superintendent, the plaintiff procured the measuring stick and mounted the machine at the place and in the manner heretofore stated, in the presence of the general manager and while the superintendent was in the room and the machine was running. It also appears that the duty of starting and stopping the machine devolved on the superintendent and the machine tenders. The claims of the defendant are that the facts and circumstances bearing on defendant's alleged defenses do not support the finding that defendant failed to furnish the plaintiff a safe place of employment and that it required, permitted, or suffered him to go and be in an unsafe place of employment. On the first branch of this question, namely, whether or not the place where the plaintiff stood on the machine while it was running was as free from danger "as the nature of the employment will reasonably permit," there is hardly room for controversy. It seems plain that the machine could have been stopped without seriously interrupting the business, and that this obviously would have rendered the place of plaintiff's employment safe and would have avoided requiring, permitting, or suffering him to go or be in an unsafe place of employment. It is strenuously contended that defendant was not in default in permitting the machine to run while the plaintiff was so engaged in making the repair, and that the presence of the manager and superintendent, who were in the room and knew how the repair was being made, did not relieve the plaintiff, because it devolved on the plaintiff, under the circumstances of his employment and duties, to have the machine stopped, and that the consequences of the machine not being stopped, under

the situation presented, are not attributable to the defendant under the statutory regulation. In considering this claim it is necessary that the ultimate questions of the plaintiff's contributory negligence and his assumption of the hazard incident to his employment be kept separate from defendant's absolute duties in the matter, though the same evidential facts may be relevant and material to all these inquiries. The plaintiff clearly ranked as a subordinate to Smith, the manager, and Torsrud, the superintendent, and was under express direction of the superintendent to repair this felt guide. The manager and superintendent both participated in directions and seeing that the duty was performed and must have known that the machine was then running. Their presence and conduct furnish a basis for the inference by the jury that they sanctioned the method of making this repair by the plaintiff while the machine was in motion, and that they thus required, permitted, and suffered the plaintiff to go and be in this place while performing this duty. Under these facts and circumstances the jury had to resolve the inquiry whether or not the defendant's representatives were guilty of an omission of duty in conducting the repair operation as was done and in requiring, permitting, or suffering the plaintiff to go and be in this place of employment while the machine was in motion. These inquiries are embraced in the first question of the special verdict, and under the evidence the jury were justified in answering it in the negative.

It is urged that the plaintiff was a millwright, and as such it devolved on him to have the machine stopped if that was necessary to provide him a safe place of employment. As heretofore stated, he was a subordinate to the manager and superintendent and under the express direction of the superintendent to make this repair. Under these relations of his employment and the circumstances of the case, it is apparent that his conduct in mounting the machine to make the repair

while it was in motion, and his duties and authority in the matter, can bear only on the questions of his having assumed the hazard incident thereto and whether or not he was guilty of contributory negligence.

Since assumption of the risk is no defense, it remains to inquire whether or not the plaintiff was guilty of contributory negligence as a matter of law. The evidence shows that his superiors in authority evidently did not regard the stopping of the machine as necessary to make the place of the plaintiff's employment as safe as the nature of the employment would reasonably permit. As we have pointed out, their conduct in this regard was a subject for inquiry by the jury, who found them guilty of a breach of duty in requiring, permitting, or suffering the plaintiff to go and be in an unsafe place under the statutory regulations governing this case. In the light of all the facts and circumstances, it cannot be said the plaintiff was guilty of contributory negligence as a matter of law in going and being in this place to make the repair in question without first requesting the machine to be stopped, nor do the facts show as a matter of law that he was negligent in the way he descended from his position on the machine and when his hand was caught between the rollers. An uncertainty as to the plaintiff's contributory negligence inheres in the case which requires that it be submitted to the jury. *Klotz v. Power & M. M. Co.* 136 Wis. 107, 116 N. W. 770. The court properly submitted this question to the jury, who resolved it in the negative.

We have examined the exceptions respecting the court's rulings on evidence and find that no prejudicial error was committed by the court. Upon the facts adduced in evidence the jury were authorized to find that the defendant failed in performing its duty toward the plaintiff in the respects hereinbefore indicated, which proximately caused the plaintiff's injuries, and that he was free from contributory negligence;

we therefore do not discuss the alleged errors bearing on other grounds of negligence. The record presents no reversible error, and the court properly awarded judgment.

By the Court.—The judgment is affirmed.

TIMLIN, J., dissents.

KNEELAND-MCLURG LUMBER COMPANY, Appellant, vs. LILLIE, Respondent.

February 24—March 17, 1914.

Trespass: Unoccupied land: Proof of title: Conveyance of standing timber: Wrongful cutting: Damages: Appeal: Harmless error.

1. If the plaintiff in an action for trespass on land was not in possession he must prove his title; and a trespasser on unoccupied land can be made to respond in damages to the owner only.
2. A written contract whereby the owner of land granted the right to buy, cut, and remove standing timber thereon, and the grantee agreed to buy, cut, and remove such timber within a certain time and to pay a certain purchase price for the right granted, was, when executed and the purchase price paid, a conveyance of the title to the standing timber and hence a conveyance of an interest in land; and a transferee of the interest of such grantee was entitled to maintain an action under sec. 4269, Stats., against one who wrongfully cut the timber. *Bretz v. R. Connor Co.* 140 Wis. 269; *Golden v. Glock*, 57 Wis. 118, and other cases, distinguished.
3. A judgment will not be reversed because the damages recovered by the appellant were fixed upon a wrong theory, if they are as large as they would have been had they been assessed upon the proper basis.

APPEAL from a judgment of the circuit court for Price county: G. N. RISJORD, Circuit Judge. *Affirmed.*

This is an action of replevin to recover lumber cut from

logs claimed to have been owned by plaintiff when the alleged trespass was committed. The jury returned the following verdict:

"(1) Was the plaintiff the owner of the timber upon the land upon which the trespass involved in this action was committed at any time prior to the time of such trespass as contemplated and provided by section 4269 of the Revised Statutes, or was he the licensee of the owner of the land? *A.* (by the court). The licensee of the owner.

"(2) Was the plaintiff the owner and lawfully entitled to the possession of the lumber manufactured from timber cut upon the trespassed land at the time of the commencement of this action? *A.* (by the court). Yes.

"(3) Did the defendant wrongfully take and detain said lumber? *A.* (by the court). Yes.

"(4) What was the total amount of each kind of lumber manufactured by the defendant from timber cut from the trespassed land? *A.* (by the court). Hemlock, 130,000 feet; basswood, 18,440 feet; birch, 38,850; maple, 3,916 feet; elm, 11,500 feet.

"(5) Was the cutting of the timber from which the lumber in question was manufactured done by mistake? *A.* Yes.

"(6) What was the true stumpage value of the timber cut by the defendant upon the trespassed land in February, 1911? *A.* $417.64.

"(7) What was the highest market value of the lumber manufactured from the timber taken by the defendant from the trespassed land at any time in the possession of the defendant? *A.* $2,871.32.

"(8) What was the total value of the lumber at the Zapfe mill manufactured from timber cut by the defendant's contractor Brockman, from section 29, at the time this action was commenced, to wit, October 17, 1911? *A.* $2,465.81.

"(9) What amount did the defendant, *Lillie,* necessarily and reasonably disburse in cutting such timber and manufacturing same into lumber? *A.* $1,927.97."

The action was commenced by the John R. Davis Lumber Company October 17, 1911, and its interest prior to the trial below transferred to the plaintiff for value. Defendant of-

fered judgment for $466.40 which was not accepted. Judgment was entered upon the verdict in favor of the plaintiff for $537.84, that is for the amount found by the jury in answer to question No. 8 of the special verdict, less the amount found by the jury by answer to question No. 9, and interest from the commencement of this action, from which judgment this appeal was taken by the plaintiff. The questions discussed are properly raised by the record.

For the appellant there were briefs by *Barry & Barry,* attorneys, and *Paul D. Durant,* of counsel, and oral argument by *Mr. Durant.*

For the respondent the cause was submitted on the brief of *W. K. Parkinson.*

KERWIN, J. There are really but two questions which require treatment upon this appeal: (1) Was the plaintiff the owner or licensee of the timber in question? and (2) Was the trespass committed by mistake?

1. The court, having found that the plaintiff was a mere licensee, ordered judgment for the total value of the lumber at the mill at the time of the commencement of this action manufactured from timber cut by defendant on the land in question, $2,465.81, less the amount necessarily and reasonably disbursed in cutting such timber and manufacturing it into lumber, namely, $1,927.97, leaving a balance of $537.81, for which sum, with interest and costs, judgment was entered. The court ordered judgment under the rule laid down in *Keystone L. Co. v. Kolman,* 94 Wis. 465, 69 N. W. 165, in which case the plaintiff was a licensee. A different rule of damages obtains under sec. 4269, Stats., where the person suing for trespass is the owner of or has an interest in the land from which the timber was cut.

It is strenuously urged here by respondent that the plaintiff was not the owner of the standing timber because it showed no title to the land, therefore it is claimed it cannot

recover in replevin or trespass. Several cases in this court are relied upon on this point, mainly *Bretz v. R. Connor Co.* 140 Wis. 269, 122 N. W. 717; *Golden v. Glock,* 57 Wis. 118, 15 N. W. 12; *Hicks v. Smith,* 77 Wis. 146, 46 N. W. 133; *Peshtigo L. Co. v. Ellis,* 122 Wis. 433, 100 N. W. 834. We do not think the case before us is ruled by the foregoing cases. They turn on the terms of the instruments conveying the right to cut and remove the timber.

In the *Bretz Case* the deed limited the right to cut and remove the timber to two years from April 15, 1901, and it was held that only such timber passed as was removed during the time specified.

In *Golden v. Glock, supra,* and other cases in this court under similar provisions limiting the time to cut and remove the timber, the same rule is laid down. But as we shall show, the cases relied upon by respondent do not rule the instant case.

True, when plaintiff in an action for trespass on land is not in possession he must prove title; and a trespasser on unoccupied land can be made to respond in damages to the owner only. *Knapp v. Alexander-Edgar L. Co.* 145 Wis. 528, 130 N. W. 504. It is not claimed that there is any flaw in the plaintiff's title here except it be in the contract between the Wisconsin Central Railway Company and the John R. Davis Lumber Company, through which the plaintiff claims. By the terms of this contract, in writing, the John R. Davis Lumber Company was given the right to buy, cut, and remove certain designated timber from certain lands of the Wisconsin Central Railway Company, and to pay therefor within a specified time the sum of $120,000. This contract, among other things, provided:

"Upon the terms hereafter stated, the railway company hereby grants unto the lumber company the right, during the term ending on December 31, A. D. 1914, to buy, cut and remove all the pine, hemlock and hardwood saw timber and

all cedar and spruce now standing and being upon the lands of the said railway company, situated in said townships thirty-seven (37) and thirty-eight (38) north, of ranges two (2) and three (3) east, of the fourth principal meridian, more particularly described in the schedule thereof, hereunto annexed and made part hereof, marked Exhibit 'A.'

"In consideration of the premises the lumber company hereby covenants and agrees that it will buy, cut and remove all said pine, hemlock and hardwood saw timber and all cedar and spruce aforesaid during the term ending December 31, 1914, and hereby agrees to pay to the railway company as purchase price of and for the right granted to it in and by the next preceding section, the sum of one hundred and twenty thousand dollars ($120,000) . . ."

This contract was fully executed and the full consideration of $120,000 paid. So the title to the timber described in the contract passed to the lumber company, and the plaintiff claims through said lumber company. This contract was not merely a contract to cut and remove within a specified time as in the *Bretz Case* and others referred to, but a contract to buy the timber, including the standing timber in suit. There are other provisions in the contract respecting the shipment of forest products over the road of the Wisconsin Central Railway Company, to go upon the lands of the railway company, establish logging camps and build logging roads, but these provisions are not material here. It is clear that the contract giving the John R. Davis Lumber Company the right to buy the described timber for a specified sum, when executed and the purchase price paid, passed the title to the standing timber to the John R. Davis Lumber Company, and a conveyance of standing timber is a conveyance of an interest in land. *Williams v. Jones,* 131 Wis. 361, 111 N. W. 505; *Bent v. Hoxie,* 90 Wis. 625, 64 N. W. 426; *Bardon v. McCall,* 108 Wis. 181, 84 N. W. 168; *Lillie v. Dunbar,* 62 Wis. 198, 22 N. W. 467.

The word "land" or "lands" includes lands, tenements, and hereditaments and all rights thereto and interests therein.

Sec. 4971, Stats. The plaintiff being the owner of the timber with an interest in the land was entitled to maintain an action under sec. 4269, Stats. *Krakow v. Wille,* 125 Wis. 284, 103 N. W. 1121; *Jones v. Costigan,* 12 Wis. 677.

2. It is further contended by counsel for appellant that the finding of the jury to the effect that the trespass was done by mistake is not supported by the evidence. The mistake referred to in sec. 4269, Stats., means an unintentional act, where ordinary care is exercised. *Webber v. Quaw,* 46 Wis. 118, 49 N. W. 830; *Brown v. Bosworth,* 58 Wis. 379, 17 N. W. 241. The question, therefore, under this head is whether the defendant used ordinary care and diligence in locating the boundary line and in not cutting over it. The court fairly instructed the jury upon this proposition, and if there is evidence to show that ordinary care and prudence were exercised by the defendant, then the finding of the jury must be sustained. We have carefully examined the evidence and are satisfied that under the repeated decisions of this court the verdict of the jury cannot be disturbed.

3. The plaintiff being the owner of the timber was entitled to the damages prescribed by sec. 4269, Stats., where the cutting was done by mistake; but since the damages recovered are as large as they would have been had they been assessed under the statute, sec. 4269, the plaintiff is not prejudiced, hence has no cause for complaint under this head. It follows that the judgment must be affirmed.

By the Court.—Judgment affirmed.

WASHBURN WATER WORKS COMPANY, Appellant, vs. TOWN OF WASHBURN, Respondent.

February 24—March 17, 1914.

Setoffs: Judgments: Authority of attorneys: Towns: Division: Incorporation of city: Adjustment of equities: Title to judgments, etc.: New trial.

1. Where a judgment creditor is sued by his debtor upon a different cause of action, he may plead his judgment by way of counterclaim, and if a balance be found due him from plaintiff may have judgment therefor.
2. Where a water company operating by virtue of a franchise granted to it by an organized town having within its limits an unincorporated village of more than 1,000 inhabitants, sued such town for hydrant rental, and the latter counterclaimed for certain judgments previously obtained against the water company, it was no defense to such counterclaim that by agreement with a former attorney for such town the judgments had been set off against a judgment the water company had recovered against a city formed from such unincorporated village, it not appearing that such attorney had any authority from the town to make such offset.
3. After judgment in such action in favor of the town upon its counterclaim, a motion was made for a new trial based upon affidavits showing that in another action between such town and such city and another town formed in part out of the original town, to settle the equities of the respective parties in the judgments against the water company, the city's proportion had been fixed by a referee at a certain sum, and that the water company had "settled" with the city, but not showing that any money had been paid to the city. *Held*, that the findings of the referee did not operate to transfer title to the judgments or any interest therein to the city, and the motion was properly denied.

APPEAL from a judgment and an order of the circuit court for Bayfield county: G. N. RISJORD, Circuit Judge. *Affirmed.*

The appeal is from a judgment and from an order denying a motion to vacate this judgment and grant a new trial.

A. W. McLeod, for the appellant.
E. C. Alvord, for the respondent.

TIMLIN, J. Findings in this case establish that the respondent on and prior to May 6, 1889, and from thence until May 1, 1904, was an organized town containing an unincorporated village of more than 1,000 inhabitants, and that the electors of said town at the annual town meeting next preceding May 6, 1889, conferred upon the town board all powers relating to villages and exercised by village boards under and pursuant to the provisions of ch. 40, R. S. 1878. On May 6, 1889, the town board of the respondent enacted and published a franchise ordinance under which the appellant exercises its powers as a public-service corporation, supplying the inhabitants of said unincorporated village called Washburn with water. On May 1, 1904, this village was incorporated as a city of the fourth class known as the city of Washburn. The plaintiff brought this action against the town of *Washburn* for hydrant rentals amounting to $1,766.65 earned by it during the four months immediately preceding the date last mentioned. This action for said rentals was not begun until after March 5, 1910. On July 18, 1904, the town obtained judgment against the appellant for $2,310, pursuant to the mandate of this court in *Washburn v. Washburn W. W. Co.* 120 Wis. 575, 98 N. W. 539. On July 25, 1904, a further judgment for costs in the supreme court in said action amounting to $52 was duly given and rendered in favor of said town of *Washburn* and against said *Washburn Water Works Company.* The judgment first mentioned was proven by the record and the judgment docket, which shows the judgment creditor to be the town of *Washburn* and the judgment debtor the Washburn Water Company, admitted in open court to be the *Washburn Water Works Company,* appellant. The other judgment seems to have been proven by the circuit court judgment docket. The first judgment was noted on the

docket, "satisfied this 19th day of July, A. D. 1907, attest F. A. Bell, clerk." But there was no satisfaction on file and nothing recorded except the foregoing. Mr. D. M. Maxcy testified that he paid both judgments to Mr. W. M. Tomkins, now deceased, by paying Mr. Tomkins $733.34 and offsetting the balance of the judgment against a judgment which he held against the city of Washburn. There was no proof of any authority conferred upon or held by Mr. Tomkins to make such settlement.

On these facts the learned circuit court gave judgment on the counterclaim of the respondent for the amount thereof less the hydrant rental of $1,766.65 and interest thereon from the time the bill for that rental was filed with the town clerk, and less the $733.34 paid to Mr. Tomkins. Three months after this judgment was rendered the appellant moved on affidavits to vacate the judgment, claiming that the town of *Washburn*, respondent, formerly included territory now in the town of Eileen as well as that included in the present city of Washburn. On October 31, 1904, the town of *Washburn* began an action against the town of Eileen and the city of Washburn for a settlement. The case was referred to a referee, and the referee reported that on April 19, 1904, the town of *Washburn* was indebted to the appellant in the sum of $1,604.70, and since that date the city of Washburn became indebted to the *Water Company* in a certain sum. The proportion of the judgment described in the counterclaim in this cause against the *Water Company* which the town ought to have was $1,604.70 and the city's proportion $757.30. It is then averred that the appellant has settled with the city of Washburn and paid its share of said judgment and did not discover this record of the suit last mentioned until June 18, 1913. No details of the payment to the city of Washburn are given, no time or place mentioned, nor is it said there was anything paid to the city of Washburn, but merely that the appellant has settled with the city of Washburn. The sub-

stance of the affidavit is that the appellant should have an additional credit for $757.30, the proportion of the judgment in favor of the town which the town owed to the city. This was opposed by an affidavit showing that the judgment in the action referred to, viz. the Town of Washburn v. City of Washburn *et al.*, did not attempt to offset said judgment against the hydrant rentals; that the appellant's attorney had knowledge of this record and personally examined it long prior to the trial of this cause, and that no part of the $757.30 mentioned was ever paid to the city of Washburn or to any other person for it.

Upon this case as presented to the circuit court the findings and the judgment were unquestionably correct. Appellant was the owner of a demand against the respondent and the respondent was the owner of two judgments against the appellant. The learned circuit court might have given the appellant judgment against the respondent and then on motion offset the respondent's judgment against that judgment. But it could also proceed in the way it did. Secs. 4258, 4263, Stats. The moving papers used upon the motion to vacate this judgment showed no sufficient ground to compel a different disposition of the case. The appellant was not a party to the suit by the town of *Washburn* against the town of Eileen and the city of Washburn for a settlement, and the findings of the referee relative to the proportionate equities between the city of Washburn and the town of *Washburn* in the judgment against the appellant, of which the latter was legally owner, did not operate to transfer title to that judgment or any interest therein to the city. For all we know and from all we can gather from this record, that was only an item in an accounting for settlement between the several municipalities which might have been offset by other items or which might enter into a judgment in favor of the city of Washburn and against the town of *Washburn*. The appellant, by the collection of the counterclaim in this case, will

have paid its own debt to its own debtor, and whether the latter, by reason of this collection, will owe something to the city or not does not concern the appellant. If the appellant had shown that with the consent of the town of *Washburn* it had paid this sum which it owed the town of *Washburn* over to the city, that would constitute a payment to the town for which the appellant should have credit and which it should have asserted in its reply to the respondent's counterclaim. Instead of doing so, the appellant produces a statement which it calls a settlement with the town of *Washburn,* not only making no claim for this specific credit of $757.30, but pretty effectually concealing it. This statement gives the town credit for the judgments described in the counterclaim in this action and another judgment, and attempts to offset this by a judgment against the city with costs and interest and the payments of $733.34 made to attorneys for the town for which it has received credit in the judgment appealed from. We are unable to discover any merit in the motion to vacate the judgment.

By the Court.—Judgment and order affirmed.

OLSON, Respondent, vs. MCDONALD, Sheriff, Appellant.

February 24—March 17, 1914.

Tax titles: Who may acquire: Duty to pay taxes or redeem: Person taking possession after sale.

1. One who owes a legal duty, contractual or otherwise, to pay the taxes on land or redeem it from a tax sale, cannot obtain a valid tax title based on such sale; and the taking of a tax deed by him amounts to a redemption.
2. The mere taking of possession of land, even under a claim of ownership, after the same is sold for delinquent taxes does not obligate the possessor to redeem from such sale or disqualify him from taking a deed on outstanding tax certificates.

APPEAL from a judgment of the circuit court for Bayfield county: G. N. RISJORD, Circuit Judge. *Affirmed.*

In May, 1906, C. H. Flynn and Phillip Guthmiller executed a bail bond as sureties in a criminal action then pending against one Lizzie Lebare. Flynn was then the owner of the southeast quarter of the northeast quarter of section 8, township 49 north, of range 4 west, in Bayfield county. Lizzie Lebare failed to appear when her case was called for trial and an action was prosecuted against her and her sureties on the bail bond and judgment was rendered therein and docketed May 26, 1908, the amount of the judgment being $576.96. On July 8, 1908, Flynn deeded the parcel of land above described to the Washburn Brewing Association, a corporation in which he was interested. On June 30, 1908, a judgment of divorce was entered in an action between Flynn and his wife, and an amended judgment was entered in such action bearing the same date but recorded May 7, 1909. The judgments in the divorce action awarded to Mrs. Flynn all of the stock of the husband in the Brewing Association, as well as the title to all lands in Bayfield county owned by the husband but standing in the name of the Brewing Association, the above described parcel of land being particularly mentioned in the judgment as one of such parcels. The 1905 taxes were not paid on the land and were returned delinquent and the land was sold in 1906 to E. A. Walsh, who assigned the certificate of sale to the Bayfield County Land Company. On June 1, 1909, Mrs. Flynn quitclaimed her interest in the land in question to the plaintiff, who it is claimed was then in possession of it. The evidence showed that plaintiff was not living on the land on June 1, 1909, but that on that date he was and for some time prior thereto had been in possession cultivating the crops. On or about June 1, 1909, the Bayfield County Land Company served notice on the plaintiff and on Mrs. Flynn and the Brewing Association of the taking of a tax deed. Thereupon plaintiff advised the owner of the tax

certificate that he desired to purchase it and that he would redeem in case of refusal to sell. It was thereupon agreed that the holder of the certificate should take a tax deed thereon and thereafter convey its interest to the plaintiff. This arrangement was carried out and the land was tax-deeded to the Bayfield County Land Company on September 4, 1909, and the deed was recorded on the same day. Thereafter the tax-deed grantee conveyed to the plaintiff. In October, 1909, the plaintiff married Mrs. Flynn. On July 11, 1911, an execution was issued on the judgment recovered in the case of State v. Flynn and others and for the full amount of the judgment, and the parcel of land before described was levied upon. It appeared that before execution was issued $100 had been paid on the judgment to the district attorney, but had not been credited thereon, nor was the payment shown on the execution. This action was brought against the sheriff to restrain the sale of the land in question on the execution and to prevent a threatened cloud being placed thereon. The court held that the tax deed cut off the lien of the plaintiff's judgment on the parcel of land levied upon. Judgment was entered according to the prayer of the complaint. Defendant appeals.

For the appellant the cause was submitted on the brief of *C. F. Morris.* He cited 23 Am. & Eng. Ency. of Law (2d ed.) 101; *Swift v. Agnes,* 33 Wis. 228; *Paul v. Fries,* 18 Fla. 573; *McLaughlin v. Green,* 48 Miss. 175; *Smith v. Lewis,* 20 Wis. 350; *Link v. Doerfer,* 42 Wis. 391; 37 Cyc. 1351; *Lacy v. Johnson,* 58 Wis. 414, 17 N. W. 246; *Bassett v. Welch,* 22 Wis. 175; *Jones v. Davis,* 24 Wis. 229; *Whitney v. Gunderson,* 31 Wis. 359; *Avery v. Judd,* 21 Wis. 262; *Edgerton v. Schneider,* 26 Wis. 385; *Perkins v. Wilkinson,* 86 Wis. 538, 57 N. W. 371; *Quinn v. Quinn,* 27 Wis. 168; *Hopkins v. Gilman,* 47 Wis. 581, 3 N. W. 382.

A. W. McLeod, for the respondent.

BARNES, J. The appellant contends that plaintiff could not take a valid tax deed, inasmuch as it was his duty to redeem the taxes on account of which the tax deed was issued, (1) because of his possession, and (2) because of his ownership of the land.

1. There is no evidence that plaintiff was in possession of the premises after the notice of June 1, 1909, was served upon him, although the inference is strong that he was. The evidence does not show whether his possession at that time was that of employee, contractor, lessee, licensee, or trespasser. On this state of the evidence it did not appear that there was any duty on plaintiff's part to redeem the outstanding taxes because of his possession. *Link v. Doerfer,* 42 Wis. 391. There is no suggestion that plaintiff was in possession when the tax was levied or that he claimed any interest in the land for more than three years thereafter, or that the tax was assessed against him. The cases relied on by appellant do not hold that the mere taking of possession of land even under a claim of ownership after the same is sold for delinquent taxes obligates the possessor to redeem such taxes and disqualifies him from taking a tax deed on outstanding tax certificates. Other considerations may impose the duty to redeem, but possession alone does not.

2. Plaintiff did not become the owner of the land until June 1, 1909. There is no claim that the tax was assessed against him. He was under no duty to pay this 1905 tax when it became due and payable. He owed nothing to the judgment creditor and was under no obligation to pay the judgment. We fail to see wherein he owed any duty to such creditor to remove outstanding tax liens from the land for its benefit. If the plaintiff owed a legal duty, contractual or otherwise, to redeem the tax he could not take a valid tax deed, and the taking of such a deed would amount to a redemption. This matter of legal duty is the correct test to apply in such

cases. *Bassett v. Welch,* 22 Wis. 175, 177; *Lybrand v. Haney,* 31 Wis. 230. No other attack is made on the validity of the tax deed.

By the Court.—Judgment affirmed.

GOTHAM and another, Appellants, vs. WACHSMUTH LUMBER COMPANY, Respondent.

February 24—March 17, 1914.

Sale of standing timber: Time for removal: Option for extension, when to be exercised: Reasonable time.

1. In a conveyance of standing timber the purchaser was given the right to remove the timber within a certain time. Afterwards, by a contract with a grantee of the purchaser, the landowner agreed that the time for removal might, at the option of the said grantee, be extended yearly until the timber was removed, upon payment of $50 per year; and said grantee agreed to pay all taxes on the land until notice of removal of the timber should be given to the landowner. *Held,* that such option, being coupled with the obligation to pay taxes, was not a mere naked option, and since no time for its exercise was specified it might be exercised and the money paid within a reasonable time after the expiration of the right to remove.
2. An exercise of such option within eleven days after the expiration of the right to remove the timber was within a reasonable time.

APPEAL from a judgment of the circuit court for Bayfield county: G. N. RISJORD, Circuit Judge. *Affirmed.*

Suit in equity to quiet the right of the defendant to remove timber standing on plaintiffs' lands. In January, 1903, the plaintiff *Gotham,* who was the owner of the lands in question, sold and conveyed the timber thereon to one Connor, giving the grantee the right to remove the same to January 15, 1909. The full consideration for the timber has been paid. In Feb-

ruary, 1903, Connor conveyed the timber and the right of removal of the same to the Red Cliff Lumber Company. The grantees agreed to pay one half the taxes on the land until timber was removed. September 29, 1907, the Red Cliff Lumber Company entered into a written contract with *Gotham* providing for a further extension of the right of removal of timber to June 1, 1910. The contract also provided that *Gotham* "does hereby further agree to and with said Red Cliff Lumber Company that the right of removing said timber may, at the option of said Red Cliff Lumber Company, be extended yearly until said timber is removed upon the payment of fifty dollars per year, or any fraction thereof, and in addition to the payments hereinbefore agreed, the said Red Cliff Lumber Company hereby covenants and agrees to pay all taxes assessed against said premises, including the taxes of 1907, until notice of the removal of said timber is given to the said *Henry E. Gotham,* providing further that in order to be released of the payment of the taxes, for the then current year, said notice shall be given on or before the first day of May of said year."

The Red Cliff Lumber Company extended the time for removal of the timber to June 1, 1911, by the payment, on or about October 25, 1910, of $50, and to June 1, 1912, by the payment of $50 on or about May 25, 1911, and paid the taxes. In January, 1912, it sold all its title in and to the timber and right to remove the same to the defendant herein. On June 11, 1912, the defendant tendered to the plaintiff *Gotham* the sum of $50 for a further extension of right to remove the timber till June 1, 1913, which tender was and since has been refused. The defendant gave no notice to be released from the payment of taxes for 1912.

The lands are vacant and unoccupied, and the plaintiff *Alvord* acquired his interest in them in October, 1912, with notice of all the rights of the defendant. Neither of the plaintiffs intended to make any use of the lands during the year

ending June 1, 1913. The value of the timber still uncut is $2,400.

The trial court held the defendant had a right to an extension of the time for the removal of the timber, and that the tender of $50 on June 11, 1912, was timely and operated to extend the time of removal to June 1, 1913, and entered judgment dismissing the complaint, from which judgment the plaintiffs appealed.

A. W. McLeod, for the appellants.

For the respondent there was a brief by *John J. Fisher* and *Lamoreux & Cate,* and oral argument by *C. A. Lamoreux.*

VINJE, J. Did the trial court err in holding that defendant had the right, June 11, 1912, to extend the time for the removal of the timber to June 1, 1913, by the payment of $50? Plaintiffs claim the right to extend was an option, and that, unless it was exercised within the time limited, it was waived, and cite *Bateman v. Kramer L. Co.* 154 N. C. 248, 70 S. E. 474; *Powers v. Angola L. Co.* 154 N. C. 405, 70 S. E. 629; and *Norfolk L. Co. v. Smith,* 150 N. C. 253, 63 S. E. 954, as particularly applicable. The wording of the options in the North Carolina cases differs materially from that which we have before us, and the facts and circumstances under which removal was sought vary, so the cases are not helpful. This option does not provide within what time it must be exercised, nor when the $50 per year shall be paid. Neither is it a mere naked option, for it is coupled with the duty on the part of the defendant to pay taxes on the lands till it gives the required notice to be relieved therefrom. So it cannot be said from the whole agreement that a definite time for the exercise of the option is expressed therein. Time of payment was not made the essence of the contract by its terms, nor did the parties so treat it, for in 1910 the payment was not made till October, and in 1911 it was made in May. The

right to remove the timber expired June 1, 1912, and in the absence of a provision in the agreement for a specific time within which the option to extend should be exercised and the money paid, it is sufficient if it be exercised within a reasonable time after the right to remove expires. *Western L. & C. Co. v. Copper River L. Co.* 138 Wis. 404, 414, 120 N. W. 277. The court found that an exercise of it within eleven days was within a reasonable time. We concur in that result.

By the Court.—Judgment affirmed.

SULLIVAN, Respondent, vs. ASHLAND LIGHT, POWER & STREET RAILWAY COMPANY and others, imp., Appellants.

February 24—March 17, 1914.

Pleadings: Complaint: Sufficiency: Demurrer: Joinder of causes of action: Accounting: Parties.

1. A general demurrer to a complaint should be sustained only when the complaint, giving to its language the most liberal construction it will reasonably bear in favor of the pleader, does not show plaintiff to be entitled to any measure of judicial redress of any character.
2. Where equitable relief is asked, the fact that there is an adequate remedy at law is not legitimate ground for a general demurrer.
3. Upon a demurrer for misjoinder of causes of action, if the complaint will fairly admit of a construction to the effect that only one cause of action is stated, that construction should be adopted.
4. The complaint in this case is *held* to state a single cause of action for an accounting as to certain corporate stocks and bonds, in which full relief requires or renders proper the presence of all the defendants named.

APPEAL from an order of the circuit court for Ashland county: G. N. RISJORD, Circuit Judge. *Affirmed.*

Action for an accounting and full relief in respect to a con-

tract plaintiff claims to have made with A. E. Appleyard. The latter was made defendant with others alleged to be aiders and abettors in depriving plaintiff of his rights. Among defendants are three corporations referred to as *Street Railway Company, Power Company,* and *Ironwood & Bessemer Company,* Appleyard being the general manager and in control through ownership of stock in his own name and the names of his co-individual defendants.

The complaint contained a statement of facts, as indicated, and appropriate allegations to connect all codefendants with Appleyard, either as guilty participants in the alleged wrong or as holders or controllers of property which of right belonged, in part, to plaintiff, they having come thereto with knowledge or reasonable means of knowledge of the facts, so as to be liable, through their connection with Appleyard, to account to plaintiff so far as they would otherwise profit, or aid in profiting, by such wrong.

The contract alleged to have been made with Appleyard is as follows: During some over three years, commencing in 1908 and ending in 1912, plaintiff and Appleyard, by mutual agreement, co-operated in promoting and organizing the *Power Company* and the *Ironwood & Bessemer Company,* and acquiring a majority of the capital stock of the *Street Railway Company,* in the interests of the other two corporations. They also co-operated in acquiring rights, privileges, franchises, and property for said corporations which was transferred thereto, at a fair profit. Such co-operative efforts and the assets acquired by the *Power Company* and the *Ironwood & Bessemer Company* were of great value thereto and essential to their business success. Such joint services were of the reasonable value of $200,000 and the fair profit growing out of the joint acquirement of the property and sale thereof was $400,000. It was agreed with Appleyard that his services and property should be paid for by issuance of corporate stock and bonds of such corporations, plaintiff to

have one third and the same proportion of the proceeds of stock sold to outside parties. The corporations accepted the benefits of such efforts, ratified the agreement aforesaid, and issued to Appleyard on account thereof a large amount of stock and bonds, some being issued in his name and the rest divided between his wife and defendants Reid, *Burgess, Lang, Merrill,* and *Sanborn.* The exact amount so issued and location thereof with said defendants, plaintiff is not able to state because of Appleyard and those acting with him in control of the corporations having refused him information thereof or to permit him to examine the corporate books. The stock and bonds so issued otherwise than to Appleyard were without consideration moving to the corporations from the persons receiving, but the same were taken and are now held upon a secret trust for him with knowledge of plaintiff's rights. The stock and bonds so issued have been so purposely confused with other such stock and bonds that nothing short of an accurate accounting, with the aid of the corporation records, will uncover the truth. Appleyard has sold some of the stock and bonds acquired by him in manner aforesaid; but the truth in respect thereto cannot be ascertained otherwise than by a coercive accounting.

Upon such facts plaintiff prayed for such an accounting as would afford him full benefit of his contract with Appleyard so far as Appleyard and his associate defendants could be made judicially liable therefor.

The *Street Railway Company* demurred to the complaint upon the ground of misjoinder of causes of action and for want of facts sufficient to make out a cause of action in equity. The other two corporations, likewise, separately demurred, and the other defendants, except Mr. Appleyard, joined in a like demurrer. All were overruled. All defendants appealed except Appleyard and Manuel M. Reid.

The cause was submitted for the appellants on the brief of *Sanborn, Lamoreux & Pray, M. E. Dillon,* and *G. F. Merrill,*

attorneys, and *Luse, Powell & Luse,* of counsel, and for the respondent on that of *Wm. F. Shea,* attorney, and *Geo. G. Greene,* of counsel.

MARSHALL, J. On the subject of sufficiency it matters not what kind of a cause of action, by name, within the broad meaning of "a civil action" the pleader attempted to state, or whether he attempted to state more than one cause of action. It was not essential that he should do more than to state concisely the facts constituting his claim for redress; that is the civil wrong he believed had been caused to him. Neither was it essential that he should ask for the proper relief,—only that he should ask for such relief as he supposed himself entitled to. Sec. 2646, Stats. Neither any misstatement as to the precise nature of the wrong, as classible by common-law names, or misstatement as to the kind of relief, or mere indefiniteness of statement are of any particular moment, as regards either sufficiency of cause or proper joinder of causes of action. It matters not that the pleading could be reasonably construed so as to defeat it, upon one or other of the grounds of demurrer, or that even, gathering from it the general idea of the pleader, would defeat it. So long as giving to the language used the most liberal construction it will reasonably bear in favor of the pleader; not necessarily in favor of the pleader's idea of the form or scope of the redress, but the idea that a remediable wrong of a civil nature of some kind had been done to the plaintiff, it can be seen that some form and measure of judicial redress is due him, there is no fatal insufficiency.

Such is the very simple liberal rule of the Code. Regardless of the nature of the wrong, within the broad field of competency of one person to remediably do another injustice of a civil character, our system affords the civil action. Sec. 2600, Stats. That fits all situations,—those requiring jury interference and those which do not as well,—and no narrow

construction of pleadings or mere technicalities of any kind are permitted, under our system, to interfere with the course of procedure from initiation to conclusion. Sec. 2668, Stats. These principles are so firmly crystallized into our written law and have been so often vindicated in our unwritten law, that there is no further need for referring to statutes or decisions with particularity. The original spirit of the Code is in complete dominance by the judicial will, many times illustrated, and by the legislative will, emphasizing anew and unmistakably the early idea of the lawmakers, particularly in sec. 3072*m* and sec. 2649*a*. The former, incorporating into the Code in legislative language the idea of this court as to what was, probably, in the beginning intended to be accomplished, sufficiently rounds out our general observations, giving point thereto as particularly applicable to the complaint before us.

Thus, in case of a general demurrer to a complaint, "if upon the facts stated, construing the pleading as provided in section 2668, plaintiff is entitled to any measure of judicial redress, whether equitable or legal and whether in harmony with the prayer or not, it shall be sufficient for such redress." To understand the full scope of this wise provision, it must be viewed in the light of the spirit of the whole system of procedure for the redress and prevention of wrongs of a civil nature, of which it forms a part, particularly the section therein specifically referred to which requires that:

"In the construction of a pleading for the purpose of determining its effect its allegations shall be liberally construed, with a view to substantial justice between the parties." Sec. 2668, Stats.

Note should be taken of the words "for the purpose of determining its effect." Not the intention of the pleader; but *the effect* as regards whether plaintiff's relation, construed with the utmost reasonable liberality in his favor, shows he has suffered a remediable wrong, or such a wrong is impend-

ing which in justice should be judicially prevented. The words, "with a view to substantial justice between the parties," are the keynote of the section as it is of the whole judicial system of which it forms a part.

The foregoing is about all that need be said, in view of the concession of counsel for appellants, to show that the order complained of must be affirmed.

On the subject of misjoinder, counsel concede that the complaint will fairly admit of a construction to the effect that only one cause of action is stated. That is enough for the occasion. If it will reasonably admit of such construction, obviously, that is the one to be adopted. Uncertainty in counsel's mind as to whether the pleader intended to state more than one cause of action, or whether more than one could be construed out of the language used, did not afford any legitimate ground for the demurrer for misjoinder.

Counsel now state that "our conclusion . . . is that only a single contract is alleged or attempted to be alleged in the complaint, and that such contract is between the plaintiff and the defendant A. E. Appleyard, and if we are correct in this conclusion there is no misjoinder of causes of action in the complaint, unless," etc., stating a supposed cause which counsel show they do not think exists and which does not appear to exist.

That conclusion of counsel seems wise. We quite agree with them. The facts alleged are to the effect that plaintiff and Mr. Appleyard joined in an enterprise of a pecuniary character in which both were to co-operate—devoting their time and experience to accomplish a profitable result to themselves and sharing in such result on the basis of one third to plaintiff and two thirds to Appleyard—that the end in view at the start, except the agreed division of pecuniary results, has been accomplished; but that Appleyard has breached his agreement and legal responsibility to plaintiff by taking or obtaining control of all pecuniary results and refusing to account

and pay over to plaintiff his share thereof, and that all the other defendants are parties to the wrong, with knowledge of the facts, and are holders or in control for Appleyard of portions of the property, in which plaintiff is, of right, a one-third owner, aiding the former to deprive the latter of his rights. That presents a very simple case for an accounting in which full relief required or rendered proper all the parties defendant. One cause of action appropriate for equitable interference to remedy a single wrong, and rendering the settlement of relations between defendants as to the property in dispute germane to the primary right.

If there was uncertainty, but we do not perceive any, as to whether the facts call for a trial after the manner of an action at law or that in equity, as we have seen, it is not, under the Code, a legitimate cause for a general demurrer. But if it was certain that respondent's remedy was of a legal nature and the complaint, in any reasonable view, in equity, the ground of demurrer upon which counsel seem to chiefly rely is not legitimate. Formerly, by judicial construction—departing from the letter as well as from the spirit of the Code, in my judgment—it was otherwise; but, by ch. 354, Laws of 1911, the sixth ground of demurrer under sec. 2649, Stats., viz. "that the complaint does not state facts sufficient to constitute a cause of action," has been limited to those cases where the complaint, construed as before indicated, does not show plaintiff to be entitled to any measure of judicial redress of any character. That was probably overlooked when the demurrer was interposed and is not referred to by counsel on either side in the briefs.

By the Court.—The order is affirmed.

KENDZEWSKI, Appellant, vs. WAUSAU SULPHATE FIBRE COMPANY, Respondent.

February 25—March 17, 1914.

Master and servant: Safety of appliances used in building: Statute construed: Slippery bridge or runway: Sufficiency of guard rail: Assumption of risk: Command of master.

1. Although sec. 1636—81, Stats., imposes upon the employer an absolute duty to see that the specified building appliances are safe and are such as to give proper protection to the life and limbs of his employees, it does not make him an absolute insurer of the safety of such employees. It is intended to secure their safety as regards all reasonable probabilities, but not all possibilities, of personal injury.
2. Where an elevated way or bridge between two buildings, made for the use of masons, was five feet in width and supplied on each side with a guard rail, firmly fixed, from three and one-half to four feet above the floor, the legislative standard of safety was met, and a finding by the jury that it was unsafe because of the want of a second guard rail below the one in place was unwarranted and was properly set aside or changed by the court.
3. The facts that the way was uncovered, that the floor was out of level to the extent of an inch and a half, and that it was slippery from the formation of ice thereon the night previous, did not show that a second guard rail was necessary or warrant a finding that the contrivance was unsafe.
4. The ordinary slipperiness of the walk being a thing as well within the anticipation of the employee as of the employer, and on the particular occasion more likely to be within his knowledge, the risk therefrom must be deemed to have been assumed by him.
5. A mere supervising or administrative direction to an employee requiring the use of such elevated way or bridge, given by one not so situated as to know the slippery condition of the walk, was not such a command as to amount to coercion or to lull an ordinary person into a sense of security, and would not absolve the employee from assumption of the risk.

APPEAL from a judgment of the circuit court for Marathon county: A. H. REID, Circuit Judge. *Affirmed.*

Action to recover compensation for a personal injury. The

accident happened February 2, 1911. Assumption of the risk and contributory negligence were then available defenses in such cases. Plaintiff, while working for defendant as a mason tender, slipped and fell on an elevated uncovered passageway between two buildings and rolled or slipped from the surface of the way, fell to the ground, and was injured. The way was some twenty feet long, five feet wide, located about twenty feet from the surface of the ground, and was furnished with a guard rail on either side three and a half to four feet above the floor. Such floor was out of level to the extent of about an inch and a half. It was in a slippery condition because of formation of ice thereon the night before. There was some conflict in the evidence respecting just how plaintiff happened to slip. He was sent to do the work in which he was engaged, was familiar therewith, and could easily have observed the condition of the floor. No question was raised as to the safety of the way under ordinary conditions; but it was claimed that defendant should have been alert to the icy condition and sanded the walk, and should have anticipated probability of the occurrence of such slippery condition as existed, and guarded against danger by covering the walk by a roof or providing two guard rails on each side and leveling the floor.

The jury found the walk was not, under the circumstances, safe, so as to give proper protection to the lives and limbs of defendant's employees using the same with due care, by reason of there not being a second guard rail on each side below the one in place. The court on motion changed this finding so as to favor defendant. The jury also found that absence of a second guard rail was the proximate cause of the injury and that an ordinary prudent person, circumstanced as plaintiff was at the time of the accident, could not reasonably have anticipated such danger as existed respecting falling from the way owing to absence of a second guard rail. The court changed both of these findings so as to favor defendant and

on the verdict so amended rendered judgment dismissing the action with costs.

A. L. Smongeski, for the appellant.

For the respondent there was a brief by *Kreutzer, Bird, Rosenberry & Okoneski,* and oral argument by *C. B. Bird.*

MARSHALL, J. Was the statutory requisite of the way, assuming it to be such as is mentioned in sec. 1636—81, Stats., provided by respondent. Applicability of the statute seems to be conceded, and nothing more favorable to appellant as to the duty of respondent is charged. Such statute requires the way to be safe, suitable, and proper, and so as to give proper protection to the life and limbs of the persons employed to use it. It requires a safety rail of wood, properly bolted, secured, and braced, rising at least thirty-four inches above the floor. The statute does not expressly require a second guard rail. It seems clear that defendant complied with the law as to guard rails unless more was required by the general call for safety.

True the statute imposes an absolute duty. No amount of care short of that which will produce the results demanded constitutes adequate performance. The employer, to that extent, is an absolute insurer. *Koepp v. Nat. E. & S. Co.* 151 Wis. 302, 139 N. W. 179; *Kosidowski v. Milwaukee,* 152 Wis. 223, 139 N. W. 187. That does not mean that the place of employment must be so safe that an employee cannot become injured. The statute makes the employer an insurer as to furnishing such a place as it requires, but not against injury to employees using the place which has been so furnished. One must distinguish between insurer as to the character of the place, satisfying the calls of the statute, and absolute insurer of safety of employees. True, it was said in *Koepp v. Nat. E. & S. Co., supra,* "It must be held that the legislature intended to make employers, in the situations dealt with by the statute, absolute insurers of the safety

of their employees, save in cases of efficient assumption of the risk or contributory negligence;" but this absolute duty of safety is measured by the statutory requirement as to physical condition. The statute, though thus given efficiency in its letter, must yet be restrained within some reasonable limitation so as not to convict the legislature of requiring the impossible. Unsafe or improper conditions are the opposites of safe, suitable, and proper. Safe and proper in that there is no such danger as that which the statute was intended to obviate, within reasonable apprehension. Safety as regards all reasonable probabilities not all possibilities of personal injury. Safe, suitable, and proper, so far as human foresight devoted to the matter, not with ordinary attention merely, but with a purpose to accomplish just what the legislature intended, a place so safe as to render personal injury so remote as to be, at most, merely within the realm of possibility. That, doubtless, was the idea of the lawmakers. The legislature has gone still further under the Workmen's Compensation Act, and none too far, in responding to the high ideals of the times; but we are dealing with the particular statute applicable to the situation in question.

Now we are not able to see why the court below did not decide right as to whether plaintiff's working place measured up to the high degree of safety required by the statute as to the particular feature involved; absence of a second guard rail. The legislative standard of safety was substantially followed. It requires one guard rail on either side, firmly fixed, not less than thirty-four inches above the floor. There was such a rail. The legislative distance clearly indicates that no danger was supposed to be within the range of reason of a person falling upon the surface of the walk and rolling under the rail.

The particular circumstances supposed by the jury to require an additional guard rail were a slight want of level of the floor and failure to sand it to remedy the slippery condi-

tion. The want of level was too trifling to be worthy of serious consideration. The floor was only one half of one per cent. out of level. Not more than the ordinary walk and more reasonably an element of safety by facilitating drainage of the walk, than one of danger. As to the element of sanding, it hardly seems that could, with any fairness, be considered with reference to the second guard rail. Moreover, the ordinary slipperiness of the walk was a thing as well within the anticipation of appellant as of respondent, and, on the particular occasion, was much more likely to be within his knowledge than that of respondent.

Appellant's counsel appreciates the situation last suggested and meets it by saying, appellant is excusable for submitting himself to whatever danger there was, because of his having gone upon the walk by orders of his superior. There was no such command in this case which would be likely to lull an ordinary person into a sense of security. There was the mere supervising direction given by a person who was not so located as to know the condition of the walk. True, he had reason to suppose it was slippery, but appellant had the same reason and when he arrived upon the walk must have observed the fact. In that case, whatever risk there was he assumed it in proceeding to carry out a mere ordinary administrative direction. Where there is a command, under such circumstances as to amount to a species of coercion, or an order, under such circumstances as to lull the person directed into a sense of security and so excuse him from failing to observe danger, the rule may be different. As said, in effect, in *Ives v. Wis. Cent. R. Co.* 128 Wis. 357, 107 N. W. 452, a rule that whenever a servant submits himself to conditions which result in his being injured, he is absolved from all self-responsibility for his safety would be a judicial abolishment of assumption of the risk and contributory negligence. The court has no function, permitting it to thus repeal the law. The legislature might have done it at any time for the

more than sixty years after it was adopted by a vote of the people in adopting the constitution, and failed until recent years to attempt to even modify it. Fortunately it has come to appreciate that it is a legislative function, not a judicial one, to change the law of negligence.

There are some detail matters called to our attention as having constituted prejudicial error, but they do not seem to be of sufficient importance to warrant saying more than to indicate that they have not escaped attention. It is considered that the decision of the trial court changing the verdict of the jury in the respects mentioned in the statement and rendering judgment for respondent cannot be disturbed.

By the Court.—Judgment affirmed.

TIMLIN, J. I concur in the result.

LANGLADE REALTY COMPANY, Respondent, vs. MAGEE and others, Appellants.

February 25—March 17, 1914.

Judgments: Vacation: Real party in interest: Notice of entry: Laches in seeking relief: Equity: Quieting title to land: Notice of lis pendens.

1. The real party in interest, though not a party of record, may, under sec. 2832, Stats., have a judgment vacated upon a proper showing within one year after its entry.
2. Actual notice of the entry of judgment in such a case was sufficient to require the exercise of reasonable diligence in seeking relief therefrom.
3. In an action to establish and quiet title to land, notice of *lis pendens* was duly filed. Defendant disclaimed title and alleged a conveyance (unrecorded) by it to other persons before the action was begun. Such other persons were not made parties. Judgment was rendered upon the pleadings, establishing plaintiff's title and barring the defendant and all persons claiming under it; and on the following day the aforesaid con-

veyance by defendant was recorded. The grantees in that conveyance knew of the judgment on the day it was rendered, but took no steps to be relieved therefrom until nearly four years later, when a second suit to quiet the title was brought against them by a grantee of the plaintiff in the former action. *Held*, that they were guilty of laches and hence were not entitled to any equitable relief against said judgment. [To what relief they might have been entitled on the facts, had there been no laches, is not determined.]

APPEAL from a judgment of the circuit court for Marathon county: A. H. REID, Circuit Judge. *Affirmed.*

This is an action to quiet title to six forties of land in Langlade county. The following, taken from the trial judge's opinion, states the material facts of the case:

"Plaintiff claims title under tax deed to W. H. Lord dated and recorded May 31, 1890, and based upon the tax sale of 1887. By sundry mesne conveyances this tax title became vested in E. A. Bassett November 26, 1906. The original title had become vested in the Bray & Choate Land Company. In May, 1891, that company in addition thereto had obtained from S. E. Leslie a quitclaim deed of two tax titles on the northeast of the northeast 2—34—12, both dated and recorded July 15, 1893, and being based respectively on the tax sales of 1889 and 1890. That company had also obtained directly to itself a tax deed of all lands here involved, dated and recorded November 4, 1895, and based upon the tax sale of 1891. Bray & Choate Land Company conveyed to Iola Land Company all of the lands by warranty deed dated and recorded in 1902.

"In this state of the record, on December 26, 1906, Bassett brought an action in the circuit court of the county in which the land was located against Iola Land Company to establish and quiet plaintiff's title to the land and duly filed a notice of *lis pendens* in that action on December 24, 1906.

"Prior to the commencement of that action defendants in the action at bar had *bona fide* purchased the lands here involved and held an unrecorded warranty deed thereof from the Iola Land Company dated May 31, 1906, but delivered at some later date prior to December 1, 1906. There is no evidence that Bassett or the *Langlade Realty Company*, for

which Bassett really held title in trust, had any knowledge of the unrecorded deed of the defendants until February 11, 1907, when the Iola Land Company served an answer in the Bassett case disclaiming title in itself and setting up such unrecorded conveyance.

"Bassett moved for judgment upon the pleadings, and judgment was rendered March 5, 1907, establishing Bassett's title and barring the Iola Land Company and all persons claiming under it. This judgment was filed in the clerk of the court's office March 7, 1907, and a certified copy recorded in the register's office March 9, 1907.

"The deed of the Iola Land Company to the defendants herein was recorded March 6, 1907. Thereafter, before the commencement of this action, Bassett's title was conveyed to plaintiff. Plaintiff does not claim any greater rights than Bassett had when he conveyed to it."

And stating further from the record:

"This action was commenced in January, 1911, up to which time the defendants had taken no steps to obtain relief from the said Bassett judgment."

Among the conclusions of law found by the trial judge is the following: that this delay constitutes laches on the part of defendants, since they should have vacated such judgment.

The action having come to issue and having been tried, the trial court ordered a judgment in favor of the plaintiff quieting its title and for costs against the defendants. This is an appeal from such judgment.

Albert S. Larson, for the appellants.

For the respondent there was a brief by *Kreutzer, Bird, Rosenberry & Okoneski,* and oral argument by *C. B. Bird.*

SIEBECKER, J. The plaintiff relies on the efficacy of the judgment entered March 5, 1907, in the action of Bassett v. Iola Land Company declaring and establishing that Bassett had title to the premises in question and barring any claim under the record title of the Iola Land Company, and any one claiming through or under it.

It is claimed and urged in defendants' behalf that their title is paramount to title of the plaintiff and not cut off by the *lis pendens* action of Bassett v. Iola Land Company; and also that their title remains unaffected by the judgment in that action, because the plaintiff in that action was notified by the answer of the Iola Land Company, disclaiming any interest in the land and alleging that it had conveyed its title prior to the commencement of the action to the defendants in this action. Bassett had no actual knowledge of such conveyance before he commenced his action, and these defendants did not cause their deed from the Iola Land Company to be recorded until one day after rendition of the judgment in the Bassett action, namely, March 6, 1907. It is also urged that the interest acquired by these defendants was not barred by such judgment because the court failed to make them parties defendant in that action upon the answer of the Iola Land Company showing it had conveyed its interest to defendants prior thereto. These claims of the defendants in this action present interesting and grave questions, but in the view we take of the case it is not necessary to consider them and therefore we leave the questions thus presented undecided.

The record of this action shows that the plaintiff's title is established and confirmed by a judgment rendered in an action brought under the provisions of sec. 3187, Stats., by one Bassett, who then owned the interest now held by the plaintiff against the record owner of the defendants' title. The plaintiff in this action also alleges that the defendants persist in asserting their claim of title to the land, in disregard of its rights under the judgment in the Bassett action.

The trial court held that defendants were guilty of laches in not seeking relief from the judgment in the Bassett action. If the ruling of the trial court is correct, then all the other claims of the defendants are immaterial to a final determination of the rights of the parties to the land involved in this action. Manifestly the judgment of record in the Bassett

action is a complete determination, as between the parties to that action, of the rights, interest, and title to the land in controversy. The judgment confirms the title of Bassett and adjudges that he is the owner in fee simple of the premises and bars the Iola Land Company and all persons claiming any right, title, or interest in said premises through or under it. The defendants have wholly failed to take any steps to be relieved of this adjudication which affects their alleged title to the premises, and now aver that they are blameless in the matter and seek the aid of equity to have this judgment in the Bassett action declared ineffectual as against the rights and title they acquired under their deed of conveyance from the Iola Land Company. It is undisputed that the defendants were informed of the pendency of the Bassett action and that a judgment was being rendered therein on the day judgment was awarded. The defendants took no steps to protect their interest as against this adjudication, and apparently took the view that they would stand on whatever rights they acquired by having their deed recorded. In the light of the knowledge thus acquired by them concerning the proceeding in the Bassett action, it became their legal duty to assert their rights to the property involved within a reasonable time after the proceeding in the Bassett action was brought to their notice.

One not a party of record, but who is the real party in interest, may on motion have a judgment vacated upon a proper showing one year after the entry. Sec. 2832, Stats.; *Lampson v. Bowen,* 41 Wis. 484.

Notice of the entry of a judgment is not required to be a written notice; it is sufficient if a party has actual notice thereof to require him to exercise diligence in seeking relief therefrom. *Butler v. Mitchell,* 17 Wis. 52. A party seeking relief from a judgment after notice thereof must proceed with reasonable diligence. *Superior C. L. Co. v. Dunphy,* 93 Wis. 188, 67 N. W. 428. The defendants, who al-

lege that they are the real parties in interest in the litigation over the land embraced in the judgment of the Bassett action, were entitled to apply to the court by motion within one year from the rendition of judgment to have it vacated upon a proper showing. This they neglected to do, but now assert the right to be relieved therefrom upon equitable grounds, after sleeping on their rights since March 6, 1907. The record discloses that they did nothing indicating any steps to impeach the judgment whereby the very rights they now assert were finally determined by the court. It furthermore appears that defendants were only aroused from total inactivity in the matter through the institution of this action by the plaintiff against them to assert its rights established by the former judgment. Upon the face of the record it is plain that the defendants have been derelict in their duty to a high degree in asserting their claims against the effect of this judgment which bars and cuts off their title to the land embraced in that litigation. Their course of conduct in the matter does not square with the idea of due diligence, but on the contrary is characterized by unreasonable delay and inexcusable neglect. Under such circumstances courts of equity must withhold relief because parties have clearly slept on their rights and are in the law guilty of laches. The trial court properly awarded judgment against the defendants upon these grounds.

By the Court.—Judgment affirmed.

FEHLHABER, Respondent, vs. MCFADDEN, Appellant.

February 25—March 17, 1914.

Slander: Words actionable per se: Pleading: Definiteness: Several causes of action: Assessing damages as an entirety.

1. **Words falsely spoken of a person in his capacity as cashier of a trust company, charging him with being crooked, with raising the amount of a note, with forging a note, and with "beat-**

ing" a depositor out of money by obtaining the surrender of a certificate of deposit without in fact paying it, were actionable *per se*.

2. The objection that the complaint was not sufficiently specific in that it did not allege that the words were spoken of and concerning the plaintiff with reference to his business, was not well taken, especially when first made after answer to the merits and verdict in plaintiff's favor.

3. Assessment of damages as an entirety will not be held error if some of the causes of action alleged were good and were supported by the evidence.

APPEAL from a judgment of the circuit court for Marathon county: A. H. REID, Circuit Judge. *Affirmed.*

This is an action for slander. The jury returned the following verdict:

"(1) Did the defendant on or about July 27, 1911, in the presence of George A. Bullion, speak of and concerning the plaintiff in his position of cashier of Wisconsin Valley Trust Company, substantially the words: 'The cashier in there is crooked. He beat me out of a couple of hundred dollars?' *A.* (by the court). Yes.

"(2) Was the defendant actuated by express malice in speaking the words set forth in question number 1? *A.* Yes.

"(3) Did the plaintiff prior to July 27, 1911, while acting as cashier for the Wisconsin Valley Trust Company, handling moneys of the defendant, unlawfully and intentionally convert to his own use $200 of the defendant's funds or a substantial portion thereof? *A.* No.

"(4) Did the defendant on or about August 1, 1911, in the presence of the plaintiff and A. L. Kreutzer, say with reference to the $325 note in question substantially the words, 'It was only $225 and you (addressing plaintiff) must have raised it to $325?' *A.* Yes.

"(5) If you answer the fourth question 'Yes,' then answer this question: Was the defendant in speaking said words actuated by express malice? *A.* Yes.

"(6) (Not answered.)

"(7) Did the defendant on September 5, 1911, in the presence of A. L. Kreutzer, say of and concerning the $50 note in question, 'It is not my signature. The note was in

his (meaning plaintiff's) possession and he is responsible for it?' *A.* (by the court). Yes.

"(8) Were the words spoken by the defendant referred to in the preceding questions, under the circumstances in which they were spoken, naturally calculated and intended by defendant to charge the plaintiff with the crime of forgery? *A.* Yes.

"(9) If you answer question number 8 'Yes,' then was the defendant in speaking said words actuated by express malice? *A.* Yes.

"(10) (Not answered.)

"(11) Was the signature of the defendant to the $50 note in question (Exhibit B) a forgery? *A.* No.

"(12) Did the defendant on or about September 5, 1911, in the presence of A. E. Kuolt, A. L. Kreutzer, and the plaintiff, speaking of and concerning a certain certificate of deposit of the sum of $150 issued by the Wisconsin Valley Trust Company to the defendant, say, 'It was never paid to me. You (addressing plaintiff) beat me out of that money,' intending thereby to charge that the plaintiff obtained the surrender of said certificate without in fact paying the same? *A.* (by the court). Yes.

"(13) Was the charge which was made by the defendant against the plaintiff as set forth in the preceding question true? *A.* No.

"(14) If you answer question number 13 'No,' then was the defendant in speaking said words actuated by express malice? *A.* Yes.

"(15) (Not answered.)

"(16) If the plaintiff is entitled to recover in this action, in what amount do you assess his actual damages? *A.* $500.

"(17) In case you award the plaintiff punitory damages, in what amount do you assess the same? *A.* $500."

Judgment was entered in favor of the plaintiff on the verdict and defendant appealed.

The cause was submitted for the appellant on the brief of *Carl N. Hill,* and for the respondent on that of *Kreutzer, Bird, Rosenberry & Okoneski.*

KERWIN, J. The verdict sufficiently shows the basis of plaintiff's claim. The appellant insists that the words are not actionable *per se*. A demurrer *ore tenus* was interposed by defendant, overruled, and the ruling is complained of as error. The words were spoken of plaintiff in his capacity as officer and cashier of the Wisconsin Valley Trust Company, charging him with criminal misconduct, and were clearly actionable *per se*. *Gross C. Co. v. Rose,* 126 Wis. 24, 105 N. W. 225; *Bilgrien v. Ulrich,* 150 Wis. 532, 137 N. W. 759; *Singer v. Bender,* 64 Wis. 169, 24 N. W. 903. But it is contended by appellant that the complaint is not sufficiently specific in that it does not charge that the words were spoken of and concerning the plaintiff with reference to his business. We think this point is not tenable even if objection had been seasonably and specifically made. But clearly, in the absence of objection by motion to make more definite, and after answer to the merits and verdict, the objection is not well taken.

Error is also assigned on the admission and exclusion of evidence. These assignments of error are entirely without merit and do not require special treatment.

It is further insisted that it was error to assess damages as an entirety, on the ground that some of the causes of action were bad. The point is not well taken. *Bushee v. Wright,* 1 Pin. 104. However in the case at bar the jury found all the causes of action in favor of the plaintiff, and we regard the verdict well supported.

We find no prejudicial error in the record.

By the Court.—The judgment is affirmed.

TIMLIN, J. I concur in the result.

JUNGDORF, Respondent, vs. TOWN OF LITTLE RICE, Appellant.

February 25—March 17, 1914.

Estoppel in pais: *Contract for building bridge: Breach by town: Damages: Validity of oral agreement.*

1. Estoppel *in pais* is the preclusion of a party to assert an otherwise conceded right because by words or conduct he has misled the other party with respect to the existence or assertion of that right in such manner and to such degree that the position of the parties cannot be equitably restored.
2. Where plaintiff, who had contracted to build a bridge for a town, stopped work thereon because notified so to do by the town chairman, the fact that he did not, until after the town had paid a second contractor who completed the bridge, make any claim that he intended to resume work or to hold the town liable or any objection to the use of materials which he had on the ground, did not estop him from recovering for breach of the contract by the town; and upon the question of estoppel it is immaterial whether the town chairman had or had not authority to stop the work.
3. Where plaintiff contracted to build a bridge for a town which was to furnish and deliver the steel beams therefor at a certain place, failure of the town to furnish the steel as agreed was a breach which entitled plaintiff to treat the contract as at an end and to recover his damages.
4. In such case the value of plank purchased by plaintiff and delivered to him at the work, but used by a second contractor in completing the bridge, might be considered in assessing plaintiff's damages, whether he had paid for such plank or not.
5. Where an oral agreement, complete in its terms, was made and by direction of one party the other commenced to perform it, the fact that they contemplated the making of a written contract embodying the same terms and the giving of a bond for performance, which was never done, did not prevent the oral contract partly performed from taking effect.

APPEAL from a judgment of the circuit court for Oneida county: A. H. REID, Circuit Judge. *Affirmed.*

This action was brought for breach of a contract by which

the plaintiff agreed to do all the work and furnish all the materials except the steel superstructure in the construction of a bridge, for which he was to receive $450. The appellant was to furnish the steel delivered at a station called Bradley, and the plaintiff to take it from there and put it in the bridge. The answer averred that some such contract was attempted, but that the plaintiff was required to enter into a written contract and give bond for its performance. Without waiting for the execution of the contract to be completed he began work, doing the work in an unworkmanlike and improper manner, whereupon he was notified that his work would not be accepted. He abandoned the work and the contract was made with another person at an enlarged expense. It is also claimed that $81 was paid to the plaintiff to apply on his work. There was a special verdict, and in answer to the first question the court found that the parties made a valid oral contract to the effect aforesaid on or about December 27, 1912, and also that the plaintiff agreed to enter into a written contract and to furnish a bond for the faithful performance thereof. The jury found that the town board and county commissioners acting with them, after making said oral contract with the plaintiff, directed him to proceed with the construction of the bridge without waiting for the making of the written contract and bond. This was a litigated question of fact.

By the third question of the special verdict the jury found that the town did not deliver the steel under such circumstances that the plaintiff could take the same and complete the bridge within the contract period. In answer to the fourth question, that the plaintiff so far as he proceeded with the contract substantially complied with the terms thereof. In answer to the fifth question, that it would have cost the plaintiff $60 to complete the construction of the bridge according to contract had he received the steel. In answer to the sixth question, that the reasonable value of the materials

furnished and work done by the plaintiff in partial construction of the bridge was $390. It was not seriously disputed that the plaintiff was prevented from proceeding with the construction of the bridge, the claim of the defendant being that the town was justified in so doing because of improper work, nor that the plaintiff received the $81. Plaintiff was awarded judgment for $309 damages, being the $390 above mentioned less the $81 received.

The appellant assigns error, first, in the ruling of the trial court that there was no evidence to support an estoppel of the plaintiff; second, instructing the jury that they should take the value of the planks furnished by plaintiff into consideration in answering the sixth question; third, error in denying defendant's motion to change the answers to the second, third, and fourth questions of the special verdict, and other errors based upon the last mentioned.

The cause was submitted for the appellant on the brief of *John Van Hecke,* and for the respondent on that of *J. R. Pfiffner.*

TIMLIN, J. Quoting from the appellant's brief: "The chairman then notified plaintiff of the defective workmanship, and because of the condition of his work and because he had not given any bond as agreed upon, told him to not go near the works any more." It is then argued that plaintiff quit work upon this invitation and never completed the bridge, and the rebuilding of the bridge was relet to another in good faith, and the latter proceeded to construct it, and that plaintiff knew that this last work was being done and made no claim that he intended to resume work or to hold the town liable nor any objection to the use by the second contractor of the materials plaintiff had on the ground until after the town had paid the second contractor for building the bridge, hence there is evidence upon which an estoppel might be found. It seems very obvious that there is here no

element of estoppel. If the town officer rightfully forbade the plaintiff to continue because of defective workmanship or because the giving of the bond was a condition precedent to commencing the work, then the plaintiff should not recover, not because he is estopped, but because he failed to perform according to the contract. This argument assumes that the town officer was authorized to stop the work. If, having such authority, he stopped the work wrongfully, the plaintiff might treat that as a breach of contract on the part of the town and maintain this action without further demonstration or protest. If the town officer had no such authority the plaintiff might be defeated because he failed to perform. But in either case the law of estoppel would not apply. Estoppel *in pais* is where a party is not allowed to assert an otherwise conceded right because by words or conduct he has misled the other party with respect to the existence or assertion of that right in such manner and to such degree that the position of the parties cannot be equitably restored. But we need not inquire into the authority of this town officer to stop the work if defective, because there is some evidence that the work was done according to contract up to a point at which the plaintiff was ready for the steel beams, and that the town breached the contract by failure to deliver the steel as agreed or at the place agreed upon. This constituted such a breach of contract on the part of the town that the plaintiff could treat the contract as at an end by the default of the town and recover his damages, and he was not required to interfere with or protest to the second contractor or to the town or be noisily assertive. The weakest point in the plaintiff's case is upon the sufficiency of his performance up to the time of breach by the town. The evidence offered by defendant tends to show such a condition of negligent and inadequate performance that it is quite as bad as the manner of transacting town business is shown to be in this town. But the plaintiff testified that he constructed the work so far

as he went in accordance with the plans and specifications, and this was evidence which the jury had a right to believe. There was ample evidence to support the finding that the town failed to deliver the steel beams and also to support the finding that the plaintiff was ordered to proceed with the construction of the bridge without waiting for the written contract and bond.

If the uncontroverted evidence established that the parties made no completed oral contract, but only entered into preliminary negotiations to be followed by a formal contract containing material provisions not covered by the oral agreement, the verdict in this case could not stand. But there was evidence from which the jury as triers of fact might infer that the oral agreement was complete in its terms and that performance on the part of the plaintiff should commence at once without waiting for the execution of the written contract and bond. If this were true, then the fact that the parties contemplated making a written contract later embodying the same terms, but which they never fully consummated, would not necessarily prevent the oral contract partly performed from taking effect. *Francis H. Leggett & Co. v. West Salem C. Co.* 155 Wis. 462, 144 N. W. 969.

We find no error in the instruction to the effect that in estimating plaintiff's damages the jury might take into consideration the value of certain plank purchased by the plaintiff and delivered to him at the work but not paid for, which were afterward used by the second contractor in completing the bridge. These were the property of plaintiff and constituted material furnished by him to the town. Whether he still owed for them or not is a matter between third persons.

We find no other points of sufficient gravity to merit further attention.

By the Court.—Judgment affirmed.

CITY OF FOND DU LAC, Respondent, vs. BARBER ASPHALT PAVING COMPANY, Appellant.

February 25—March 17, 1914.

Appeal: Prior decisions adhered to: Municipal corporations: Illegal contract: Judgment, upon whom binding: Recovery of money paid on void contract: Laches.

1. Prior decisions of this court to the effect that defendant's paving contract with the plaintiff city was vitiated by fraud, and that the judgment in an action to restrain the city from making such contract was binding on defendant, which appeared in such action by counsel, are adhered to upon practically the same record.
2. The fact that an action by a city to recover money paid by it on an illegal contract was not brought until more than two years after the payment did not necessarily show laches precluding a recovery, it not appearing that the delay operated in any way to defendant's disadvantage.

APPEAL from a judgment of the circuit court for Fond du Lac county: CHESTER A. FOWLER, Circuit Judge. *Affirmed.*

Action to recover money paid by the city for a pavement under a void and fraudulent contract. Further facts appear in *McMillan v. Fond du Lac,* 139 Wis. 367, 120 N. W. 240, and in *McMillan v. Barber A. P. Co.* 151 Wis. 48, 138 N. W. 94. The trial court held the plaintiff was entitled to recover, and from a judgment entered accordingly the defendant appealed.

Frank M. Hoyt, for the appellant.

For the respondent the cause was submitted on the brief of *L. E. Lurvey,* city attorney, and *H. E. Swett,* of counsel.

VINJE, J. Defendant again argues the absence of fraud in its contract with the city, though this court has twice held to the contrary. *McMillan v. Fond du Lac,* 139 Wis. 367, 120 N. W. 240, and *McMillan v. Barber A. P. Co.* 151 Wis. 48, 138 N. W. 94. That the hardship imposed upon it by

the ruling in the latter case was necessitated by its own conduct was clearly shown by the opinion of the court therein, and the grounds therefor need not be restated. The way of transgressors is still hard.

It is also urged that the defendant is not concluded by the judgment in the case of *McMillan v. Fond du Lac,* 139 Wis. 367, 120 N. W. 240, because, while it appeared by counsel in that case, it did not have control of the litigation. The same contention was made in *McMillan v. Barber A. P. Co.* 151 Wis. 48, 138 N. W. 94, upon practically the same record, and was disposed of adversely to the defendant. We are satisfied the ruling was correct.

Plaintiff paid the money sought to be recovered in January, 1909, and this action was begun in March, 1911. It is claimed the city has been guilty of such laches as to preclude a recovery. It does not appear that the delay has in any way operated to the disadvantage of the defendant. So, irrespective of the correctness of the claim of the plaintiff that it required about two years to elect officials who would prosecute the action, it cannot be held that the trial court erred in finding there was no laches.

By the Court.—Judgment affirmed.

WHINFIELD, Respondent, vs. TRUSTEES OF THE DIOCESE OF FOND DU LAC, Appellant.

February 26—March 17, 1914.

Principal and agent: Juggling of securities by agent for several persons: Transfer of title: Possession.

1. One S., who was plaintiff's agent, was also the treasurer of the defendant corporation and as such had the keeping of its funds and securities. He was a defaulter to both parties. Having in his possession a note and mortgage belonging and payable to the plaintiff, he pretended to sell them to defend-

ant and converted to his own use the moneys paid therefor by defendant. No assignment or indorsement of the note or mortgage was ever made, and they remained in the possession of S. until his death, being kept a part of the time with defendant's securities and a part of the time with plaintiff's. The executor of S. turned them over to defendant. *Held* that, the equities of the parties being equal, plaintiff's legal title to the securities must prevail.

2. The possession of the securities by S. was as much plaintiff's possession as it was defendant's, and the mere exhibition of them to auditing committees of the defendant was not a change of possession or delivery thereof to defendant.

APPEAL from a judgment of the circuit court for Fond du Lac county: CHESTER A. FOWLER, Circuit Judge. *Affirmed.*

Action of replevin to recover a note and mortgage for $6,800, executed by one Hinn, March 11, 1910, payable five years from its date with interest at five per cent. The action was tried by the court. The essential facts were practically undisputed and were as follows: The plaintiff is, and was at the times hereinafter mentioned, the duly appointed and qualified executrix of the will of one Roger Whinfield, who died prior to November, 1909, leaving plaintiff, his executrix, sole beneficiary. The estate inventoried about $170,000. In November, 1909, plaintiff, being about to leave the state for a time, executed and delivered to Nathaniel W. Sallade a very sweeping power of attorney, giving him full power to deal with, invest, and reinvest the moneys, funds, and securities of the estate, stipulating only that the moneys be deposited in the Fond du Lac National Bank when received by him. At the same time the securities of the estate, which were kept in a safety deposit box at said bank, were turned over to him. Sallade was at this time and until his death continued to be one of the defendant's trustees and was the secretary and treasurer of the board. As such treasurer he had the keeping of the funds and securities of the diocese and he deposited the diocesan funds in the First National Bank credited to his personal account and subject to

his own personal check, to the knowledge of all the trustees. During all the time covered by the transactions in controversy Sallade was greatly interested in and the active manager of a manufacturing concern called the Fond du Lac Church Furnishing Company. This concern was in failing circumstances, and prior to March, 1910, Sallade had used large sums of the funds of the Whinfield estate to keep the concern going, taking notes of the concern running to himself for the advances. At the time of his death in August, 1911, Sallade's defalcation to the estate amounted to about $50,000. In March, 1910, Sallade invested $6,800 of the funds of the estate in the note and mortgage in question, the note being payable to the order of the plaintiff. For some time prior to June, 1910, money of the diocese had been coming into Sallade's hands as treasurer. The diocesan council was to meet June 7th, at which time Sallade's duty was to make full report of the condition of the various funds in his hands and exhibit the securities, if any, to the finance committee. He should have had $5,040 in cash in his hands, but as matter of fact had only $3,248.48 to his credit in the bank, having used the balance for his own purposes. In order to prepare for his accounting to the diocese he represented to the other members of the executive committee of the trustees on June 3d that the Hinn mortgage was for sale and proposed that the diocese invest its money in this security, representing that there was $5,040 on hand and that the trustees should give the note of the diocese for $1,840 to make up the total amount of $6,880 necessary at that time to purchase the security. The committee consented to this plan, the note was given, the proceeds credited to Sallade's personal credit at the bank, and Sallade in a few days checked out the entire sum then in the bank, *i. e.* $5,088.48, and deposited the same in another bank to the credit of the manufacturing concern before mentioned. No part of the money

ever went to the credit of the Whinfield estate. Sallade listed the mortgage in a book kept by him as treasurer of the diocese, and noted therein that $6,880 was paid for it. No assignment of the note or mortgage was ever made nor were they ever indorsed. At the meeting of the council on June 7th this note and mortgage was reported by Sallade as a security of the diocese in hand and was produced by Sallade, examined and checked over by the auditing committee, with the other securities scheduled, but this committee made no report. No assignment was produced to the committee with the Hinn mortgage, but the omission was not noticed. In March, 1911, Sallade collected the annual interest on the Hinn note and turned the same over to the diocese. The mortgage was reported by Sallade as belonging to the diocese at the June, 1911, meeting of the diocesan council and the accounts and securities were checked over as in 1910. The committee at this time reported that the securities had been examined, the expenditures checked up with the vouchers, and found in due order and correct as reported. No assignment, however, was present at this time. *Mrs. Whinfield* returned to Wisconsin for a few days in September, 1910, and testifies that she then examined the securities of the estate in the safety deposit box and found the Hinn note and mortgage among them. There is nothing in the case to discredit or contradict this testimony, and the trial judge was convinced of its truth. Sallade died August 10, 1911, and after his death the note and mortgage in suit were found in his desk at the office of the manufacturing establishment aforesaid in a bundle of other securities which were duly assigned or indorsed to the diocese and unquestionably belonged to the diocese, but no assignment of the note and mortgage in suit was found or ever has been found and the note was never indorsed. The executor of Sallade's estate turned over all these securities to the trustees, and hence this action.

The trial judge concluded on these facts that the plaintiff was the owner of the note and mortgage and entered judgment accordingly, from which the defendant appeals.

For the appellant there was a brief by *T. L. Doyle,* attorney, and *F. W. Foster,* of counsel, and oral argument by *Mr. Doyle.*

For the respondent there was a brief by *Thompson, Thompson & Jackson,* and oral argument by *J. C. Thompson.*

WINSLOW, C. J. In this case one of two innocent parties must suffer, and the only question to be determined is which one. That depends entirely upon the title to the note and mortgage in suit, and that question does not seem difficult. When the note and mortgage were executed they were made payable to the plaintiff as security for the repayment of moneys advanced from the Whinfield estate. There can be no doubt, therefore, that the plaintiff originally had both the legal and equitable title. How then did the diocese acquire title? Not by assignment or indorsement of the note, for neither is shown. Not by delivery of possession, for the possession of Sallade was just as much plaintiff's possession as it was defendants', and the mere exhibition of them to the auditing committees at the time of the diocesan councils cannot be called a change of possession. The diocese has no greater equity than has the plaintiff. Both had advanced money to pay for the securities and the money of both had been used by the unfaithful trustee, who deceived his principals and juggled the securities back and forth as he was called on by either one to account for his stewardship. The equities being evenly balanced, the party who has the legal title must inevitably prevail, and that party is the plaintiff.

By the Court.—Judgment affirmed.

ALEXANDER, Administratrix, Respondent, vs. MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, Appellant.

February 26—March 17, 1914.

Railroads: Failure to fence: Absolute liability for injury: Proximate cause: Contributory negligence: Gross negligence: Driving lengthwise on track: Inadvertence: Intoxication: Highway crossing: Depot grounds: Constitutional law.

1. Under sec. 1810, Stats., a railway company being absolutely liable for injury "occasioned in any manner, in whole or in part," by its failure to fence its road as therein required, the ordinary rules relative to proximate cause are not applicable and contributory negligence is not a defense.
2. Where, at a point where defendant should have fenced its road, the team which plaintiff's intestate was driving went upon the right of way at night without his knowing it, because of his intoxicated condition or his inattention, and within twenty minutes thereafter, having traveled about 450 feet on the right of way, the horses and the deceased were struck and killed by a train, such facts constituted no defense to an action for damages on account of his death, the jury having found that such death was occasioned, in whole or in part, by the want of a fence where the team entered on the right of way. *McDonald v. C., M. & St. P. R. Co.* 75 Wis. 121, distinguished and doubted.
3. Sec. 1811, Stats., which prohibits traveling lengthwise upon a railroad track, under penalty, does not preclude a recovery in the case above stated, the deceased not having wilfully or intentionally entered upon the right of way and not having purposely or avoidably remained or driven thereon.
4. Mere inadvertence, even when caused by intoxication, with no element of intentional, wanton, or reckless action, does not amount to gross negligence.
5. The evidence in this case does not show that there was any highway crossing at the point where plaintiff's intestate got upon the defendant's right of way which would excuse defendant from building and maintaining a fence; and it supports a finding by the jury that the place was not depot grounds.
6. Sec. 1810, Stats., is valid and does not conflict with federal legislation.

APPEAL from a judgment of the circuit court for Marquette county: CHESTER A. FOWLER, Circuit Judge. *Affirmed.*

The plaintiff as administratrix of her husband's estate brought this action to recover damages caused by the defendant's alleged negligence in causing the death of her husband while on the railroad track of the defendant and appellant in the village of Westfield, Marquette county, Wisconsin, on the evening of January 16, 1912.

The plaintiff bases her right of action upon negligence in failing to maintain a fence as required by sec. 1810, Stats. The defendant denies that this section has any relation to the situation and denies that a fence was required. Defendant also set up as a defense the violation by deceased of sec. 1811, Stats., prohibiting persons from riding or driving lengthwise of the railroad track when not fenced. Defendant also challenged the validity of sec. 1810, Stats.

Motion for directed verdict in favor of defendant was denied. The jury returned the following verdict:

"(1) Was the place where Mr. Alexander's team went upon the railroad property a part of the depot grounds? *A.* No.

"(2) Was the death of Mr. Alexander occasioned in whole or in part by the want of a fence at the place where the team entered upon the said property? *A.* Yes.

"(3) What sum will compensate *Mrs. Alexander* for the pecuniary loss sustained as a result of her husband's death? *A.* $5,000.

"(4) What was the horse, harness, and sled owned by Mr. Alexander reasonably worth at the time they were destroyed? *A.* $175."

The usual motions were made after verdict by defendant, denied, and judgment entered for plaintiff on the verdict, from which this appeal was taken.

For the appellant there was a brief by *W. A. Hayes,* at-

torney, and *John L. Erdall,* of counsel, and oral argument by *Mr. Hayes.*

D. W. McNamara, for the respondent.

KERWIN, J. The deceased, a farmer forty-two years of age, drove to the village of Westfield, a distance of two or three miles, with a span of horses and sleigh in the afternoon of January 16, 1912, delivered some farm produce to a married sister who resided on the outskirts, and then drove to the business part of the village. Between 5 and 6 in the evening deceased was in a saloon with his brother, had drank some, and started for home about 6 o'clock or shortly before. The night was dark, cold, and stormy. He started driving his team in the direction of his home, got onto the defendant's railroad track at a point where it was not fenced, continued on the track for some distance to a trestle, where the team was struck by a north-bound passenger train and the team and deceased were killed. The main contention of appellant is that upon the evidence produced the plaintiff cannot recover. The evidence tends to show that on the evening in question, when the deceased started for home, he was under the influence of liquor, but apparently able to manage his team; that the team, or one of the horses, was spirited and easily frightened at flashes of light or unusual noise and likely to take fright and run. The deceased after starting for home drove to Main street, turned and drove two blocks to the street connecting with his home road, turned at this street and drove across a bridge to the railway track, which he crossed. At the time he reached the railway track the electric light was turned on, which sputtered considerably. This electric light was located at a point near where the team of deceased turned from the main road onto a vacant strip of land lying adjacent to and west of the defendant's right of way and extended southerly about 1,000 feet from Lawrence

road, the road upon which deceased was driving when his team turned onto the strip along the right of way. This strip or street, so called, was more or less used for travel. Deceased's team, as evidenced by sleigh tracks, turned from Lawrence road onto this strip of land at a point about twenty-five feet from the electric light and fifty feet beyond the rails of the railway track. The team followed this strip along the west side of defendant's right of way about 700 feet, then turned towards the right of way, crossed the west line of the right of way 100 feet further on, reaching the rails 100 feet beyond this point, and followed the rails to a trestle crossing, so the team traveled about 450 feet on the right of way. The trestle was open and the fill at the commencement of it about thirteen feet high. The embankment was narrow at the top and sloped at the sides at an angle of about thirty-five to forty degrees. The ground and right of way between the rails was covered with snow. It does not appear that deceased had any purpose in going upon this side street and getting upon the right of way. For some reason his team turned off Lawrence road and down the strip or street referred to and onto the right of way, which was not fenced. There is some evidence that the team ran part of the way. The team was struck within twenty minutes after it got upon the right of way. The strip of land adjacent to the right of way was about fifty feet wide and extended southerly from Lawrence road 1,000 feet, and ended at a fence crossing it at about right angles and joining the fence on the right of way from there on, the right of way not being fenced up to that point. The part of the right of way in question is on the edge of the village.

The learned counsel for appellant relies upon *McDonald v. C., M. & St. P. R. Co.* 75 Wis. 121, 43 N. W. 744, and the trial judge below favors us with a very able opinion, which is in the record, in which he finds some facts in addition to those found by the jury, and concludes, first, that

McDonald v. C., M. & St. P. R. Co., supra, was not correctly decided; and second, that, if correctly decided, it does not rule the instant case. We think the learned trial judge is correct in his second conclusion, and whether he is or not in the first we regard a serious question. Whether *McDonald v. C., M. & St. P. R. Co., supra,* is good law we need not and do not decide, because we are satisfied it does not rule this case.

The trial judge found:

"Whatever the fact may have been in the *McDonald Case,* and whatever inference of ultimate fact the court may have drawn from the evidentiary facts of that case, I am satisfied that the deceased in this case did not wilfully or intentionally enter upon the defendant's right of way, and that he did not purposely or avoidably remain or drive thereon; that he was not guilty of wilful misconduct; that he was not guilty of gross negligence in fact or as matter of law under sec. 1811; that he was intoxicated to a considerable extent and was guilty of a high degree of negligence that contributed proximately to his death; but I think that this constituted contributory negligence and nothing more. From this I conclude that the motion for judgment for the plaintiff should be granted."

The jury found that the death of the deceased was occasioned in whole or in part by the want of a fence at the place where the team entered upon the property of defendant. Sec. 1810, Stats., imposes absolute liability upon railroad corporations for injury on account of failure to fence their roads (except depot grounds), "occasioned in any manner, in whole or in part, by the want of such fence." *Atkinson v. C. & N. W. R. Co.* 119 Wis. 176, 96 N. W. 529. Under this statute, if the want of a fence contributes in any manner to cause the injury the defendant is liable. The ordinary rules relative to proximate cause are not applicable. *Atkinson v. C. & N. W. R. Co., supra.* Nor under the statute is contributory negligence a defense in cases where the injury

is occasioned in any manner, in whole or in part, by the want of a fence. *Quackenbush v. Wis. & M. R. Co.* 62 Wis. 411, 22 N. W. 519. But it is strenuously insisted that sec. 1811, Stats., which prohibits traveling lengthwise upon the track under penalty, precludes recovery in this case; that the deceased was on the track by his own wrong, either wilfully or by inadvertence because of his stupid condition brought about by his voluntary act in becoming intoxicated. The trial judge concluded, as appears from his opinion in the record, that the deceased's team either got beyond his control from fright at the turning on and sputtering of the electric light, and went upon the track, and that he was unable to get them off before he was struck, or that they turned and went upon the track without his knowing it, on account of his intoxicated condition or inattention. We think this conclusion of the learned trial judge is well supported by the record and constitutes no defense to the present action. Here it cannot be said as matter of law that the failure to fence did not occasion in whole or in part the injury, or that deceased made a deliberate and intentional entry upon the track. *Ulicke v. C. & N. W. R. Co.* 152 Wis. 236, 139 N. W. 189; *Schwind v. C., M. & St. P. R. Co.* 140 Wis. 1, 121 N. W. 639.

Construing the evidence most favorably to the defendant, if the deceased got upon the track and continued thereon by inadvertence, under such circumstances, under the repeated decisions of this court, he was not guilty of gross negligence. *Willard v. C. & N. W. R. Co.* 150 Wis. 234, 136 N. W. 646; *Jorgenson v. C. & N. W. R. Co.* 153 Wis. 108, 140 N. W. 1088; *Barlow v. Foster,* 149 Wis. 613, 136 N. W. 822; *Bolin v. C., St. P., M. & O. R. Co.* 108 Wis. 333, 84 N. W. 446; *Haverlund v. C., St. P., M. & O. R. Co.* 143 Wis. 415, 128 N. W. 273.

In *Tunnison v. C., M. & St. P. R. Co.* 150 Wis. 496, 137 N. W. 781, the court found that the plaintiff was violating

sec. 1811, Stats., yet it was held that he was guilty of contributory negligence only, notwithstanding that he was knowingly and intentionally upon the track. No inadvertence can amount to gross negligence under the rule established by this court. There must be some element of intentional, wanton, or reckless action. No such element appears in the instant case. The team got upon the track, obviously, from inadvertence because of its escaping from the control of the deceased or because of his intoxicated condition. The only possible intentional or wilful wrong which could be attributed to the deceased would be his purposely drinking to excess. There is no evidence of this. On the contrary, so far as the evidence shows, it appears that he was able to manage his team when he started for home, and intoxication has been held by this court not gross negligence as matter of law. *Jorgenson v. C. & N. W. R. Co., supra; Nekoosa-Edwards P. Co. v. Industrial Commission,* 154 Wis. 105, 141 N. W. 1013. It is said in the case last cited: "It is quite possible for a person to be in an intoxicated condition, which condition proximately caused the accident which proximately caused the death, and yet not be guilty of wilful misconduct." In any view of the evidence in this case it seems clear that deceased was not guilty of gross negligence.

The learned counsel for appellant argues with much force that *McDonald v. C., M. & St. P. R. Co.* 75 Wis. 121, 43 N. W. 744, controls this case, but conceding, without deciding, that that case was decided rightly, there are many points of difference between it and the instant case. The court in the opinion appears to hold that, while there may not have been any negligence on the part of the deceased in getting upon the track, the evidence shows that he continued to travel for a long distance upon the track after becoming conscious that he was upon it, and that it appears there was no difficulty in getting off the track. It therefore appears from the opinion in the *McDonald Case* that the deceased intentionally con-

tinued to travel upon the track for a long distance, and the court held that he was guilty of gross negligence. There are many other features in the *McDonald Case* quite different from those in the case at bar, but it would serve no useful purpose to refer to them at length.

It is also insisted by appellant that there was a highway crossing at the point where deceased got upon the right of way. This contention is not supported by the evidence. It seems that Mr. Wilson, a resident on the east side of the right of way, and perhaps others, were in the habit of crossing the track, but it does not appear that there was any regular crossing. Moreover, the right of way on the west side was unfenced for a distance of about 1,000 feet southerly from Lawrence road, and the evidence is ample to sustain a finding that the team got upon the track because of such unfenced condition. Clearly the evidence does not show that there was any such crossing at or near the point in question which would excuse the defendant from building and maintaining a fence.

Counsel further contends that the place where the team entered upon the right of way was depot grounds. The jury found to the contrary, and we think this finding is supported by the evidence and that the question was one for the jury.

Some other points are discussed by counsel for appellant respecting the constitutionality of sec. 1810, Stats., and its alleged conflict with federal legislation. We do not regard the contentions under this head tenable. We think the case was fairly tried and no prejudicial error committed, therefore the judgment should be affirmed.

By the Court.—Judgment affirmed.

SHAFFER, Respondent, vs. MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, imp., Appellant.

February 26—March 17, 1914.

Railroads: Collision with traction engine at highway crossing: Injury to person at a distance: Reasonable anticipation: Negligence: Speed of train: Caution at crossings: Giving of statutory signals: Positive and negative testimony: Setting aside jury's finding: Insufficient lookout on engine: Number in train crew: Slackening speed of train: Inevitable accident.

1. Where, as a result of a collision between a fast train and a traction engine at a highway crossing, a piece of iron was hurled through the window of plaintiff's house 147 feet distant and injured her, such injury, though unusual, was not remote and was within the range of reasonable anticipation.
2. In view of the existing demand for fast train service, and the fact that the legislature has restricted the speed of trains only in cities and villages, a finding of actionable negligence cannot be sustained upon mere proof that a limited passenger train was operated through the open country at a speed of fifty-seven miles an hour.
3. Where a limited passenger train, in a run of 368 miles, encounters 362 grade highway crossings, ordinary care does not require that it should be slowed down at each of such crossings.
4. The fact that between the whistling post and a point 300 feet distant from an ordinary grade crossing there is a one-degree curve in the track, the track being straight for a long distance beyond those points in both directions, is not alone enough to require greater precautions in approaching such crossing than the statute prescribes, where the view of the track from the intersecting highway is unobstructed; although where there are special circumstances or conditions which should and ordinarily would induce an ordinarily prudent person to exercise greater caution, the rule may be different.
5. Positive testimony of the trainmen as to the giving of statutory signals as the train approached the crossing in question, considered in connection with the weather conditions, the negative character of opposing testimony, and the opportunities for observation of the witnesses giving it, is *held* to have justified the trial court in setting aside the findings in the special verdict to the effect that the signals were not given.

6. It appearing that at this stage of his run the duties of the fireman in keeping up steam took all his time, the fact that he was not at the cab window when the collision occurred did not warrant a finding that he was negligent.
7. The number of men to be carried on a locomotive engine being regulated by sec. 1809*r*, Stats. 1913, it is not within the province of a jury to say that a railway company is negligent in not having a larger crew.
8. Where a traction engine is seen approaching a railway crossing under customary easy control, the operators of a train which is also approaching such crossing are not required to slacken its speed, but have the right to presume that there will be no attempt to cross ahead of it.
9. Where a traction engine was propelled upon a railway track under such circumstances that it was impossible to stop a train in time to avoid a collision after the trainmen, in the exercise of ordinary care, had observed it on the track, the mere fact of the collision does not justify a finding that the trainmen were negligent.

APPEAL from a judgment of the circuit court for Chippewa county: JAMES WICKHAM, Circuit Judge. *Reversed.*

The plaintiff brought this action against the appellant and W. C. Smith and John Lockins (Lokken) for personal injuries. On August 13, 1912, she was in her house, which was about 147 feet southwest of a highway grade crossing of the appellant railway. By reason of a collision at said crossing between a threshing traction engine on the highway and a train of the appellant on its track, caused, it is charged, by the joint negligence of both, a piece of iron was hurled across the intervening space through the window of plaintiff's house and struck her, causing the injuries complained of. The defendants answered separately, each denying negligence.

The jury returned a special verdict containing seventeen questions and answers: (1) The defendant failed to exercise ordinary care in running the train at a speed of fifty-seven miles per hour when approaching the crossing. (2) This was a proximate cause of plaintiff's injury. (3) The de-

fendant failed to blow the whistle eighty rods east of the crossing. (4) This was a proximate cause of plaintiff's injury. (5) Defendant failed to ring the engine bell continuously from the whistling post to the crossing. (6) This was a proximate cause of plaintiff's injury. (7) The defendant in approaching the crossing failed to keep a proper lookout. (8) This was lack of ordinary care. (9) This was a proximate cause of plaintiff's injury. (10) The defendant could have stopped the train in time to avoid the collision after the traction engine should have been first seen from the cab of the engine. (11) In failing to stop the train in time the defendant did not exercise ordinary care. (12) This was the proximate cause of plaintiff's injury. (13) Defendants Smith and Lokken failed to look or listen for an approaching train before going onto the railway track at the crossing. (14) This was the proximate cause of plaintiff's injury. (15) Defendants Smith and Lokken failed to exercise ordinary care in attempting to cross the railway track with their threshing outfit at the time and in the manner they so attempted. (16) This was the proximate cause of plaintiff's injury. (17) Plaintiff was damaged in the sum of $3,300.

On motion the court struck out, for want of evidence to support it, the affirmative answer to question 3 and substituted in lieu thereof the answer "No;" the affirmative answer to question 5 and substituted in lieu thereof the answer "No;" and the affirmative answers to questions 4 and 6; and gave judgment against all the defendants for the damages mentioned.

For the appellant there was a brief by *W. A. Hayes,* attorney, and *John L. Erdall,* of counsel, and oral argument by *Mr. Hayes.* They contended, *inter alia,* that there was no actionable negligence in running the train at the speed shown, since the facts demonstrated the necessity therefor if the train was to make its schedule time, perform its public

duties, and make necessary mail connections. *Jordan v. Osborne,* 147 Wis. 623, 133 N. W. 32; *Sutton v. C., St. P., M. & O. R. Co.* 98 Wis. 157, 73 N. W. 993; *Muster v. C., M. & St. P. R. Co.* 61 Wis. 325, 334, 21 N. W. 223; *Schofield v. C., M. & St. P. R. Co.* 114 U. S. 615, 5 Sup. Ct. 1125; *Newhard v. Pa. R. Co.* 153 Pa. St. 417, 26 Atl. 105, 19 L. R. A. 653; *Lake Shore & M. S. R. Co. v. Barnes,* 166 Ind. 7, 76 N. E. 629; *Partlow v. I. C. R. Co.* 150 Ill. 321, 37 N. E. 663; *Omaha & R. V. R. Co. v. Talbot,* 48 Neb. 627, 67 N. W. 599; *Custer v. B. & O. R. Co.* 206 Pa. St. 529, 533, 55 Atl. 1130; *McKonkey v. C., B. & Q. R. Co.* 40 Iowa, 205; 2 White, Pers. Inj. on Railroads, § 970; *Chicago & N. W. R. Co. v. Bunker,* 81 Ill. App. 616. There was no negligence in regard to a lookout; the engineer kept constant watch and the fireman all that was possible; and it was not for the jury to say that there should have been a third man on the engine. *Newhard v. Pa. R. Co., supra; O'Brien v. Wis. Cent. R. Co.* 119 Wis. 7, 96 N. W. 424; *Louisville & N. R. Co. v. Gilmore's Adm'r,* 131 Ky. 132, 109 S. W. 321; *Louisville & N. R. Co. v. Creighton,* 106 Ky. 42, 50 S. W. 227; *Brammer's Adm'r v. N. & W. R. Co.* 104 Va. 50, 51 S. E. 211; *Northeastern R. Co. v. Martin,* 78 Ga. 603, 3 S. E. 701; *Frost v. M. & N. R. Co.* 96 Mich. 470, 56 N. W. 19; *Western R. Co. v. Lazarus,* 88 Ala. 453, 6 South. 877; *Howard v. L., N. O. & T. R. Co.* 67 Miss. 247, 7 South. 216; *Houston & T. C. R. Co. v. Smith,* 77 Tex. 179, 13 S. W. 972; *Early's Adm'r v. L., H. & St. L. R. Co.* 115 Ky. 13, 72 S. W. 348.

For the defendants Smith and Lockins there was a brief by *W. H. & T. F. Frawley.*

For the respondent there was a brief by *D. Buchanan, Jr., V. W. James,* and *Thomas D. Schall,* and oral argument by *Mr. James* and *Mr. Buchanan.*

TIMLIN, J. The consequence of the collision complained of is unusual but not remote. It was within the range of

reasonable anticipation that fragments might fly and, flying, might strike some person or object, and the fact that this particular fragment flew a long distance and entered a house before striking the plaintiff would not bring the case within the rule of *Hasbrouck v. Armour & Co.* 139 Wis. 357, 121 N. W. 157. The highway and the railroad run nearly east and west and are nearly parallel for a considerable distance easterly and westerly of the crossing in question. Coming upon the highway from the east and along the south side of the railroad right of way we reach a place where the highway makes a turn to the north, crosses the railroad tracks diagonally, then turns west, and continues west on the north side of the right of way and nearly parallel therewith. The roadbed of the railroad at the crossing is three or four feet higher than the level of the highway, and the wagon tracks slope up to the rails for several feet. The crossing is furnished with a plank outside and inside each rail lying parallel with the rails. For 318 feet east from the crossing the railroad track is straight. From that point east 944 feet the track is slightly curved. There is what the railroad engineers call a one-degree curve. This indicates the curve of a segment of the circumference of a circle of which circle a chord of 100 feet in length will represent one degree, or in other words a circle of about 2.2 miles diameter. Fifty-eight feet further on and 1,320 feet or eighty rods from the crossing is the whistling post. There is nothing to conceal an approaching train from the eastward view of one on the highway at any point within three or four rods of the rail. The colliding bodies were the railroad company's high-speed limited passenger train *en route* from Chicago to Minneapolis and the threshing traction engine and boiler of the defendants Smith and Lokken; the time was about 12:30 p. m. on August 13, 1912, the day fair, the wind from the northwest with a velocity of about sixteen miles per hour. The track is straight for a mile or more eastward of the whistling post and westward of the crossing in question.

Counsel for appellant contends there was no evidence to support the jury findings 1, 7, and 11. In addition to controverting this claim, respondent's counsel contends that the trial court erred in changing the answers of the jury to questions 3 and 5, and seeks to support the judgment also on her exceptions to such ruling.

First. With reference to jury finding (1), it appears without controversy that the train in question was what is known as a limited passenger, carrying seven coaches. It leaves Chicago at 2:45 a. m., runs to Minneapolis, and arrives at the latter city, a distance of 465 miles, at 4:40 p. m. There are about sixty-five stops on this trip and the average stop is three to five minutes. The train is drawn by three different engines, the first being from Chicago to Fond du Lac, the second from there to Chippewa Falls, the third from there to Minneapolis. It takes half an hour to get out to the city limits of Chicago and about half an hour to go the ten miles from St. Paul to Minneapolis. Three hundred and sixty-eight miles of this trip are through the state of Wisconsin, and in this part of its route there are 362 grade crossings without gates, flagmen, or bells and somewhat similar to the crossing in question. About sixty miles of this distance is through incorporated cities and villages, where a low maximum speed is prescribed by statute. The crossing in question is between Cadott and Chippewa Falls, which stations are twelve and three-tenths miles apart, and, allowing for stops and slowing up, the train had fourteen minutes in which to make that distance.

It must be apparent that to make the schedule time between Chicago and Minneapolis under the circumstances above detailed the train must reach a speed of sixty miles an hour or thereabouts on some parts of the route. During a run of fourteen hours a locomotive cannot be always kept at its full-speed efficiency even between crossings and outside of cities and villages, and an absolutely uniform rate of speed

even in the open country is not always possible. In the 368 miles of the trip through Wisconsin the train passes over 362 grade crossings, so that the mere fact that the train is approaching a crossing cannot require a slackening of this necessary speed because the train is practically always approaching a crossing. The curve described between the whistling post and the crossing in question, considering the absence of obstruction to the view of an approaching train, is not alone enough to call for precautions greater than those required by statute law. Ordinary observation must convince every one that such a high-speed train on such a trip is approaching or passing over such curves every few minutes during the greater part of its journey. To decide in the face of these uncontroverted facts that the speed in question was such as to form a basis for a finding of want of ordinary care would be to set up an artificial and arbitrary standard of ordinary care which all know is not practiced by those engaged in like business under like circumstances. Those in charge of the operation of such trains are required to make the schedule time; it can only be done by such speed in the open country, and if there is any one to blame it must be the managers of the railroad in imposing such a schedule upon their employees. But such managers are required by public demand and by competitive forces to do so, and the statute law, by regulating speed in other places, impliedly permits the managers to arrange their own schedule and regulate their own speed at these places. *Jordan v. Osborne,* 147 Wis. 623, 133 N. W. 32; *Sutton v. C., St. P., M. & O. R. Co.* 98 Wis. 157, 73 N. W. 993. It would require a positive rule of law, rather than a comparison with what ordinarily prudent persons do under like circumstances, to make the rate of speed alone negligence. It is not the function of the jury to establish a rule of law, hence there was nothing to support the first finding of the jury. Courts have in the past established certain rules of ordinary care which in time

became rules of law, and excluded the power of the jury to compare the conduct in question with that of an ordinarily prudent person under the same or similar circumstances. But this was done only in very clear cases. *White v. M., St. P. & S. S. M. R. Co.* 147 Wis. 141, 133 N. W. 148. It is for the legislature, not for the courts, to say that the defendant shall change its train schedule, and this is what holding the defendant negligent on the ground of excessive speed would amount to. When there are special circumstances or conditions which should and ordinarily would induce an ordinarily prudent person to exercise greater caution, the case is different. *Michaels v. C., B. & Q. R. Co.* 146 Wis. 466, 474, 131 N. W. 892.

The actual speed of the train is fixed by the evidence. Witnesses estimate the speed at not less than sixty miles per hour, while a speedometer on the engine registered fifty-seven miles per hour. There is no room for estimate or even conjecture. Fifty-seven miles per hour is that speed found by the jury and most favorable to support the judgment, and hence fifty-seven miles an hour it must be. But this immovable fact affects all the other facts in a most extraordinary manner. The distance from the center of the crossing between the tracks east to the whistling post is 1,320 feet or eighty rods. Hence the time in which all the transactions testified to occurred is 15.8 seconds. The ordinary velocity of sound in still air at ordinary temperature would cut off from this 1.2 seconds; with the wind blowing as it was, still more. This would not, of course, limit the time of the train's travel, but would limit the time for getting over the crossing after the signal was given and heard. The threshing rig, consisting of a traction engine fifteen feet long, a separator twenty feet long hitched by its pole to the rear of the traction engine, made a moving train forty or forty-five feet long, allowing ten feet for the pole and connections. The highest speed at which this moved was four miles per

hour, and it slowed down to one mile per hour for safety to the tractor and separator in approaching and crossing the rails diagonally. The owner of the threshing outfit, on the tractor steering, knew the limited train was about due. It was not possible for this threshing rig to cross in this way in 14.6 seconds or in 15.8 seconds had the train given all the statutory signals. That is a very simple matter of computation. To cross the zone of contact the rig should travel fifty or fifty-five feet. This matter of time and speed also affects the testimony relative to failure to keep a lookout and that relative to giving or failing to give the statutory signals. With reference to the alleged failure to give the statutory signals there were several witnesses about one quarter of a mile further west than the crossing in question who testified that they were watching the train while the train was at or near the whistling post and heard no signals, but one testifies (and his testimony is not disputed) that thick, black smoke was issuing from the smokestack. The wind was blowing from the west. Under such circumstances the distance and direction of the wind with attention to other duties may have prevented hearing, and the steam issuing from the whistle with the smoke and smokestack between it and the observer would not shoot up as from a train standing still or moving slowly, but would trail along mingled with the smoke about level with and behind a train moving at fifty-seven miles per hour. The testimony of these witnesses is not inconsistent with the fact that the train was somewhat west of the whistling post when they observed it. The trainmen testify that the statutory signals were given. Their testimony was positive; the other was in substance negative, although in form not so, and the opportunities for observation by the witnesses who testified to the omission of signals were very imperfect. The time was too short and the movement too swift for any accurate or reliable observation from their viewpoint. The men in immediate charge of the threshing rig do not pretend

to know or else give purely negative testimony. The learned circuit judge who presided and heard the evidence must be supported in his ruling setting aside the answers to questions numbered 3 and 5.

Witnesses on the part of the plaintiff testify that the train did whistle, some say just as it left the west end of the curve, some say at forty rods distant, and one witness, who was about one fourth of a mile west of the crossing and the train coming toward him at the speed stated, testifies that the train did not whistle until within twenty feet of the tractor. All this refers, not to the crossing signal, but to the alarm or danger whistle, which the trainmen say was also sounded as soon as the tractor was observed on the crossing and at about 500 feet distant therefrom. The automatic bell was still ringing when the train stopped after the collision, but no one seems to have heard it before. This testimony on the part of the plaintiff tends to corroborate the trainmen and clashes with other testimony on the part of the plaintiff tending in some slight degree to sustain the charge that a proper lookout was not kept. Omitting for the present the fact that the fireman was not at the cab window on the left side, the testimony of the engineer is that he blew the whistle at the whistling post and was at his post at the throttle lever keeping a lookout, saw the tractor on the track at the crossing when about 500 feet therefrom, then blew the alarm whistle, then set the air brake, which brought him within about 100 feet of the tractor. He then called to his fireman and both crouched down below the boiler head to avoid being hit with flying missiles or swept off with the cab in the then inevitable collision. This was quite a number of movements to make in six seconds. There is no room for doubting that he made all these movements within six seconds or less. He did not see the tractor before because he was at his place on the northerly or right-hand side of the cab and the tractor was approaching from the other side. The testimony of plaint-

iff's witnesses that there was no one at the lookout window on the engineer's side must relate to the second he was crouching behind the boiler head, for all agree he blew the alarm whistle, although, as might be expected, all disagree as to the distance of the locomotive from the tractor when the alarm whistle was first blown. Distance was being devoured pretty rapidly about that time, and what was actually done by the engineer, if done swiftly, measures fairly well with time and distance.

It is conceded that the fireman was not at the lookout window on the south or left-hand side at any time during the run from the whistling post to the place of collision. He testifies that he began work at North Fond du Lac that morning at 6:45 a. m. and they were nearing the end of his run at Chippewa Falls. In this time he had to shovel ten tons of coal, the last five tons twice, shake down the grates, rake the fire, wet down the coal, take on water at stops, clean the deck of the cab, take signals at the fireman's side, and keep a lookout. He could not look out standing on the deck of the cab, but must go up two steps into the proper position. His duties were such that he could not look out more than one minute in seven. At the time in question he had less time than usual to look out, for the coal in the tender at the end nearest to the boiler had been consumed and he was obliged to bring the coal from the rear end of the tender forward and also to feed it into the firebox with sufficient regularity to keep up steam, and at this stage of the journey that took all his time. It would not be possible to keep up the required steam on this train and also keep a lookout at all curves and crossings. The locomotive engine at high speed has a rocking or rolling motion and he would lose about a second in focusing an object on the track or very near it, but he says if he had seen this traction engine he would not have known it was going to attempt to cross. This testimony is not controverted and is no doubt true.

It is argued that the defendant should under the circumstances, in the exercise of ordinary care, have had two firemen on this engine or at least an extra lookout man. But the statute seems to cover this. Sec. 1809*r*, Stats. 1913. The jury could not say that this fireman was negligent in not being at the cab window at this particular time under the circumstances, nor that the defendant must have a larger crew than the statute requires.

Again, this tractor was either on the track or approaching it when the train was at the whistling post. If approaching the track and under such easy control as such machines are, the train was not obliged to slacken its speed for it, for the operators had a right to presume it would stop before attempting to cross ahead of the oncoming train. If on the track at that time, the trainmen, as the evidence shows, at once upon observing this took every precaution. It requires no evidence to show that it was utterly impossible to stop a train of this weight and speed in time to avoid a collision after the trainmen, in the exercise of ordinary care, had observed the traction engine on the track. It is not the law that an object can be by third persons put upon a railroad track in such a way that a collision therewith is inevitable and then charge the railroad men with negligence merely on the ground that a collision occurred. There must have been some lack of ordinary care causing the injurious result on their part or on the part of the railroad company through other agents. We find no such evidence in the record. We have not found it necessary to consider the rule of the New York cases cited in *Ransom v. C., St. P., M. & O. R. Co.* 62 Wis. 178, 22 N. W. 147 (overruled on another point in *Walters v. C., M. & St. P. R. Co.* 104 Wis. 251, 260, 80 N. W. 451), with reference to the alleged omission of statutory signals.

By the Court.—Judgment reversed as to the appellant only, and remanded with directions to dismiss the complaint as to the appellant only.

KINZIGER, Respondent, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant.

February 27—March 17, 1914.

Railroads: Negligence in stopping train: Injury to passenger: Damages.

1. Evidence tending to show that upon the stopping of a freight train the bump of the cars in taking up the slack was an unusually hard one and sufficient to throw the plaintiff (a passenger) and the conductor from their seats in the caboose and to cause the conductor to utter emphatic censure of the engineer, is *held* to sustain a verdict to the effect that the train was brought to a standstill in a negligent manner.
2. Although there was proof that causes adequate to produce a floating kidney existed before plaintiff's injury, and that the symptoms were to some extent the same before and after such injury, but more aggravated after it, the evidence considered as a whole is *held* to have warranted the jury in awarding substantial damages.
3. An award in such case of $3,000 (reduced by the trial court from $6,000) is upheld.

MARSHALL, J., dissents.

APPEAL from a judgment of the circuit court for Oconto county: W. B. QUINLAN, Circuit Judge. *Affirmed.*

This is an action for damages for personal injury. The plaintiff was a passenger on a freight train and claimed to have been injured by falling from her seat in the caboose to the floor of the car. The failure of duty charged to the defendant was the negligent manner in which the train was stopped. The defendant contended that the jar which caused the plaintiff to fall was due to the running in of the slack after the engine came to a standstill and that such jar was a necessary incident to the operation of the freight train and that there was nothing unusual about the manner in which it was stopped when plaintiff was injured, considering the place where the stop was made, and that therefore defendant was not negligent. The jury on a general verdict found this issue in favor of the plaintiff.

The plaintiff further claimed that the fall produced a dislocation of the right kidney and that thereafter she suffered from a floating kidney and from an obstruction of the flow of urine from the kidney which caused intense pain. The defendant contended that plaintiff had a floating kidney long before the injury complained of and that such injury resulted in no substantial damage to her. On this issue the jury must have found against the defendant, inasmuch as it returned a verdict assessing plaintiff's damages at $6,000. These damages were held to be grossly excessive by the trial court, and an option was given plaintiff to take a new trial or a judgment for $3,000. She elected to take this latter option, and from the judgment entered defendant appeals.

The question whether the evidence warranted the jury in awarding substantial damages is the closest one in the case. The accident occurred August 24, 1910. According to the testimony of the physicians, the most common causes of floating kidney are straining, lifting, falling, and childbirth. Plaintiff was married in November, 1906, and gave birth to a child early in 1908, and had a miscarriage during the fall of that year. Prior to her marriage she had done what was for a woman heavy farm work, including pitching hay and carrying baskets of potatoes. The winter following her marriage she did the cooking for a crew of twenty-odd men in a logging camp and thereafter did her household work, including washing.

Prior to April 12, 1905, plaintiff suffered pain on the right side of the lower part of the abdomen. She consulted Dr. Minahan, and he diagnosed her trouble as appendicitis and operated on her. It does not appear whether the appendix was diseased or removed. Plaintiff testified that the operation gave her relief from the dull pain which she had, but that some pain remained higher up in the vicinity of the gall bladder, and also that she had a dull pain drawing down the right shoulder and reaching through the back under the

shoulder blade and around in front. Dr. Minahan again examined her in April, 1906, and concluded to make an exploratory operation, the incision being made a little higher up than the former one and apparently in the vicinity of the gall bladder. The trouble was not removed at this time. The gall bladder was found to be in a normal condition and the wound was sewed up without accomplishing anything. Plaintiff further testified that her health was good after this operation until she was injured by the fall in the railway car in 1910. Her attending physician, Dr. Gaunt, testified that the 1906 operation did no good, but that the rest while she was laid up probably did, and furthermore that after the operation he treated her up to and after the accident. He says, however, that he did not treat her for a pain in the side after the second operation and before the accident. The nature of the treatment he did give does not appear. The evidence is undisputed that after the injury the pain in the side became very severe and at times so intense that plaintiff had to be relieved by morphine. Dr. Gaunt testified that the symptoms after the accident were the same as those experienced before the 1906 operation, except that the pain was much more severe. The jury might well have found that a very significant indication of floating kidney developed after the fall in 1910, to wit, excessive voidance of urine. The very severe pains seem to have started about December 1, 1910, and Dr. Gaunt concluded that the trouble was gall stones and that an operation was necessary, but deferred it because the plaintiff was then pregnant. In November, 1911, he operated on plaintiff for gall stones. He found the gall bladder large and drained it, but the operation did not help. In February, 1912, Dr. Connell examined the plaintiff and he diagnosed the disease as Jacksonian bands and operated on her for this trouble. This operation produced no beneficial results. Dr. Minahan was present on this occasion and said he saw the dislocated kidney and it was a

dislocation of several years' standing. Dr. Murphy examined the patient in May, 1912, and concluded that she had a floating kidney. Apparently he was the only physician who had been informed of the excessive discharge of urine at times. Dr. Murphy made his incision from the back, put the kidney in place and stitched it to the posterior wall of the loin. He testified that the excessive pain was due to the kinking of the ureter or tube through which the urine is conveyed from the kidney to the bladder, so as to obstruct the passage of urine through the tube, and also that the operation would result in more or less discomfort, but would save the kidney from destruction. The medical testimony tended to show that the fall on the train was an adequate cause to produce a floating kidney.

Edward M. Smart, for the appellant.

For the respondent there was a brief by *Gill & Chase* and *Classon & O'Kelliher,* and oral argument by *D. G. Classon* and *J. B. Chase.*

BARNES, J. It has been thought advisable to set out a fairly full synopsis of the leading facts in the case in order to get an intelligent understanding of the contentions made by appellant's counsel. He urges (1) that causes adequate to produce a floating kidney were shown to exist before the accident; (2) that the symptoms were the same before and after the accident; and (3) that the direct medical proof was to the effect that the floating kidney was of long standing when the February, 1912, operation was performed.

An extended discussion of the evidence would serve no useful purpose. It must we think be conceded that causes adequate to produce a floating kidney were shown to exist prior to the accident. The symptoms before the 1906 operation and after the accident were the same except that the pain was much more severe after the accident than it had been at any time before, and the evidence tended to show that

there was no excessive voidance of urine prior to the injury in 1910. It is not seriously disputed that plaintiff suffered little if any pain in her side after the 1906 operation until she was injured. She testifies that her general health was good, and in this she is corroborated by her mother. It is true, her physician, Dr. Gaunt, testified that he treated her from the time of the second operation until after the injury. The evidence does not show how frequently he treated her or for what trouble, except he says he did not treat her for a pain in the side. During this interval she gave birth to a child and had a miscarriage. So it is apparent that she had need of a physician for ailments other than that of floating kidney. We have then a situation where sufficient causes to produce a floating kidney existed as early as 1905 and symptoms which, in view of the subsequent history of the case, strongly indicated that such was the trouble. But we also have a situation where the jury might well have found that for more than four years after the fruitless operation of 1906 the earlier symptoms had entirely disappeared and the plaintiff was in good health. Then came the fall adequate to produce the result found and the subsequent intense pain and suffering which induced the plaintiff to undergo three very serious surgical operations within a period of six months. The medical testimony leaves us entirely in the dark as to whether a kidney once displaced will return to its normal place without an operation. There is some testimony tending to show that, where there is a dislocation, conditions may be greatly aggravated by a blow on the back. It would appear to be reasonable enough to the layman that a fall such as plaintiff sustained would be very liable to seriously aggravate the condition of the kidney if it was not in a normal condition at the time. If the injury was sufficient, as the doctors testified, to dislocate a normal kidney, it might well produce serious consequences in an abnormal one. We conclude that there was a sufficient basis in the evidence for

awarding substantial damages to the plaintiff and that the judgment entered cannot be held to give an excessive amount. The testimony of Dr. Minahan as to the long-standing character of the trouble cannot be considered controlling. It is of course a mere expression of opinion. His evidence showed that he observed the kidney through the peritoneum when Dr. Connell performed his operation, and no explanation is offered as to how it was possible to tell that the trouble was of more than eighteen months' standing. Dr. Murphy, who sewed the kidney in place and who had a better opportunity to observe it than any one else, testified that the fall in 1910 was sufficient to produce the result which he found.

The evidence was sufficient to warrant the jury in finding that the train was brought to a standstill in a negligent manner. There was evidence strongly tending to show that the bump was an unusually hard one. Besides, there is one very persuasive item of evidence in the case. No one knew better than the conductor whether the stop was of the usual kind or whether it was unnecessarily violent. He was in the caboose when the stop was made and was thrown from his chair by it. The plaintiff testified to what he said in reference to the stop. The statement was more emphatic than elegant and need not be repeated. It clearly indicated that the conductor thought the jar caused by the stop was neither usual nor necessary and that the engineer was not properly doing his work. The conductor does not deny making the statement, although he said he did not remember of having made it.

By the Court.—Judgment affirmed.

The following opinion was filed March 23, 1914:

MARSHALL, J. (*dissenting*). I think the evidence shows, very clearly, that respondent was a sufferer from floating kidney years before the accident. She had been twice oper-

ated upon without discovering her difficulty. She had substantially the same symptoms before the accident as afterwards; not so pronounced, perhaps, but sufficiently significant to move eminent advisers and operators to explore the cavity of the body in front and below the location of the kidneys for some physical infirmity requiring a replacement. The only positive expert evidence in the case given on the precise basis for opinion evidence confirms all direct evidence on this point. I think, from the record, there is not much, if any, doubt but that respondent's injury caused by the fall from the seat consisted of an increase of an old difficulty.

In the circumstances stated, what is the duty of this court? Is it to allow the verdict to have full efficiency upon the theory the fall from the seat produced the floating kidney and that respondent had no such difficulty during the period immediately before the fall, when that course would rest on the merest conjecture, and hardly that, and is opposed by substantially all the affirmative evidence, direct as well as circumstantial? This court has said, and it is one of the vital principles of our system of jurisprudence, where controversies as to facts must be settled by jury interference, that no amount of mere possibility or conjecture can afford sufficient weight to support a probability, much less a reasonable certainty. When a verdict is allowed to stand in violation of that salutary principle, the jury system is discredited. It should have its proper dignity. That dignity is great and commanding where there is any basis for diverse reasonable inferences. Where there is not, it has no function to perform at all. To arouse it to activity and to rest upon its baseless fiat, gives the law the cast of an instrumentality of wrong rather than of justice.

Now the award of damages, below, was made by the jury and modified, though allowed to stand, by the court, upon the theory that the respondent was not afflicted with floating kidney prior to her fall from the seat. As I do not think there

is any fair basis for that, I cannot escape the conclusion that the verdict is excessive. As before indicated, there was pretty strong evidence that the fall, moderately, increased a prior long-standing infirmity, and the award of damages should therefore be largely decreased as in *Baxter v. C. & N. W. R. Co.* 104 Wis. 307, 80 N. W. 644, so as to cure the infirmity, and so emphatically as to avoid prejudicing appellant by compelling it to submit to the modified award without a new trial.

GRAB, Appellant, vs. LUCAS and others, imp., Respondents.

February 27—March 17, 1914.

False imprisonment: Arrest on civil warrant: Mistake as to bond required: Liability of plaintiffs: Constables: Placing person in jail.

1. Presence of the plaintiffs in an action in justice's court at the time when the defendant therein was brought before the justice pursuant to a civil warrant of arrest, was proper; and their mere presence, without participation in the proceedings, did not render them liable for a mistake of the justice in demanding of the defendant a bond in excess of the statutory requirements.
2. Officers having in their custody persons under arrest may lawfully place them for safe-keeping in any proper and suitable place, such as a city or county jail.
3. A person so placed in jail by a constable having him in custody remained, in contemplation of law, in the custody of the constable, although the sheriff was the custodian of the jail.

APPEAL from a judgment of the circuit court for Oconto county: W. B. QUINLAN, Circuit Judge. *Affirmed.*

Action for false imprisonment. Two years before its commencement *Zierath* and *Magnin* caused the plaintiff to be arrested on a civil warrant and brought before the defendant Van Vuren, who was a justice of the peace. The defendant

Mars acted as attorney for *Zierath* and *Magnin,* and the defendant *Lucas* was a constable, who arrested the plaintiff and brought him before the justice. Plaintiff desired a continuance, and tendered a bond—insufficient under the statute. The justice required him to give a bond imposing greater burdens upon the surety than the statute provides for, and upon his failure to give such bond the justice committed him to the custody of the defendant *Lucas,* who placed him in the county jail, where he remained for the period of about one hour, when he was released. It appears that considerable conversation took place before the justice between him, plaintiff, and the defendant Mars as to the insufficiency of the bond tendered and as to the terms of the one required. Neither of the defendants *Zierath, Magnin,* or *Lucas* took part in such conversation, though present. At the close of the trial in the circuit court a verdict was directed for the defendants *Zierath, Magnin,* and *Lucas.* The defendants Van Vuren and Mars did not appear. From a judgment entered in favor of the defendants *Zierath, Magnin,* and *Lucas* the plaintiff appealed.

For the appellant there were briefs by *Minahan & Minahan,* and oral argument by *E. R. Minahan.*

For the respondent *Lucas* there was a brief by *Classon & O'Kelliher,* and oral argument by *D. G. Classon.*

For the respondents *Magnin* and *Zierath* there was a brief by *Gill & Chase,* and oral argument by *J. B. Chase.*

VINJE, J. No claim is made that the civil warrant was not properly issued nor that plaintiff was not lawfully arrested thereon, but it is urged that the defendants *Zierath* and *Magnin,* being present before the justice at the time the bond was required to be given, must be held to have participated in the illegal demand for a bond in excess of the statutory requirement. In the bond tendered, the surety agreed to secure the appearance of the plaintiff at the adjourned day, but

did not agree to pay if such appearance was not secured. In the bond demanded, the surety was required to pay if plaintiff did not, even though his appearance was secured, while the statute, secs. 3633, 3635, requires the surety to pay only in the event the appearance of plaintiff is not secured. The defendants mentioned were properly present, as the statute commands the officer making the arrest to notify the plaintiff. Sec. 3603. But their mere presence in court without any participation in the proceedings for the giving of the bond cannot be held to render them liable for a mistake of the justice as to the terms of the bond. They were farmers, not versed in law, and presumably were ignorant of the statutory requirements of such a bond. A verdict was properly directed in their favor. *Langford v. B. & A. R. Co.* 144 Mass. 431, 11 N. E. 697.

The ground of liability urged against the defendant *Lucas* is that he had no right to place plaintiff in the county jail after the justice committed him to his custody upon his failure to give the bond required. Just what disposition the constable should have made of his prisoner plaintiff's counsel fails to point out in his brief, and acknowledged upon oral argument he was unable to state. But he was certain that plaintiff should not have been put in jail. Without attempting to reply to counsel's argument or to lay down rules indicating in what cases it is or is not proper for officers to place persons under arrest in jail, it can be said that defendant *Lucas,* under the circumstances of this case, was justified in placing plaintiff there for safe-keeping. No claim is made that the jail was unsanitary, or that plaintiff was needlessly placed in a cell, or abused or mistreated in any way. His detention there was only an hour, though that is not material. It might lawfully, so far as the constable was concerned, have continued till the adjourned day. Officers having persons under arrest in their custody may lawfully place them for safe-keeping in any proper and suitable place such as a city or

county jail, otherwise they could not be safely kept. While the primary function of a jail is a place of detention for persons committed thereto under sentence of a court, they are also the proper and usual places where persons under arrest or awaiting trial are kept till they appear in court and the charge against them is disposed of. *In re Kindling,* 39 Wis. 35. See, also, *Gebhardt v. Holmes,* 149 Wis. 428, 135 N. W. 860. While plaintiff was so kept there he was, in contemplation of law, in the custody of the constable, though the sheriff was the custodian of the jail. The court properly directed a verdict in favor of *Lucas.*

By the Court.—Judgment affirmed.

LEGAULT, Appellant, vs. MALACKER, Respondent.

February 27—March 17, 1914.

Dogs: Injury to person: Viciousness: Scienter: *Pleading.*

1. Sec. 1620, Stats., makes allegation and proof of *scienter* unnecessary as well in case of injuries to persons as in case of injuries to cattle by dogs.
2. A complaint which alleges that a dog attacked and wounded a person who at the time was where he might lawfully be and in the exercise of ordinary care, is sufficient without alleging that the dog was vicious and mischievous. The law no longer "allows a dog his first bite."

APPEAL from an order of the circuit court for Marinette county: W. B. QUINLAN, Circuit Judge. *Reversed.*

The action is brought by a father to recover damages resulting to him by reason of the illness and death of his minor son. The complaint alleges, in substance, that the defendant owned a certain dog and that on a certain day while the plaintiff's son, in the exercise of due care, was lawfully in and upon the highway, said dog attacked and bit

him, so wounding him that he subsequently died as a result of his said injuries. Resulting damages are also fully alleged. A general demurrer to the complaint was sustained, and the plaintiff appeals.

For the appellant there was a brief by *Gilbertson, Lehr, Reitman & Kiefer,* attorneys, and *Lehr, Kiefer & Reitman* and *J. Elmer Lehr,* of counsel, and oral argument by *J. Elmer Lehr.*

For the respondent there was a brief by *Eastman, Goldman & Fairchild,* and oral argument by *H. R. Goldman.*

WINSLOW, C. J. The respondent claims that the complaint should allege (1) that the dog was vicious or mischievous, and (2) that the defendant had knowledge of that fact.

Upon these contentions the court holds:

1. Sec. 1620, Stats. 1911, makes allegation and proof of *scienter* unnecessary as well in case of injuries to persons as in case of injuries to cattle by dogs. The doubts expressed in *Kertschacke v. Ludwig,* 28 Wis. 430, and *Slinger v. Henneman,* 38 Wis. 504, are not considered well founded.

2. Where a complaint alleges that a dog attacked and wounded a person who at the time was where he might lawfully be and in the exercise of ordinary care, it is unnecessary to go further and allege that the dog was vicious or mischievous. Such a dog is necessarily vicious and a separate allegation to that effect is unnecessary. The law no longer "allows a dog his first bite," as was said to be the case before the passage of the law abolishing proof of *scienter.*

By the Court.—Order reversed, and action remanded with directions to overrule the demurrer to the complaint.

HANNON, Respondent, vs. KELLY and others, Appellants.

February 27—March 17, 1914.

Contracts: Oral testimony adding to writing: Conveyance of hotel property: Hay scales in street included: Fixtures: Conveyance of lot by metes and bounds: Ownership.

1. Where a writing is but a part execution of an entire oral contract, the parties having elected to permit the rest to remain in parol, such remainder may be shown by oral testimony; but the writing is not to be contradicted, and if it clearly indicates that it was intended to embody the entire contract the oral testimony is not admissible.
2. In the case of a sale of a certain hotel property the fact that the deed, in addition to describing the real estate, mentioned the furniture in certain rooms as also conveyed (a schedule of same being attached), but did not refer to the platform hay scales in the street adjacent to the hotel, did not preclude testimony to show that in the oral contract of sale the scales were included, even assuming the scales to be personal property.
3. Where an article is plainly a fixture and part of the real estate, no concession by counsel during the trial of an action, even though indorsed by the court, can change the obvious fact and make such article personalty.
4. Platform hay scales used in connection with a hotel property and owned by the hotel proprietor, set in the ground in the customary manner, though outside the lot line and within the boundaries of the street, were a fixture and unless expressly reserved would pass by a deed conveying the lot.
5. A sale and conveyance of realty abutting upon a street, in the absence of express indications to the contrary, includes the land to the center of the street, and the mere fact that a lot is described by metes and bounds following the lot lines does not bring a case within the exception.

APPEAL from a judgment of the circuit court for Oconto county: W. B. QUINLAN, Circuit Judge. *Affirmed.*

Action to recover possession of personal property.

One *Matilda Hannon* owned and possessed a hotel property in the city of Oconto having the usual accessories to accommodate and attract customers, such as a saloon and, in the

street in front just outside the curb line, a pair of platform hay scales. The scales were set in the ordinary way and had the appearance of being permanently affixed to the realty as a part of the hotel property. It was a valuable part thereof both as an inducement to people to patronize the hotel and as a direct source of profit. The situation was so represented to plaintiff during negotiations between her and the owner respecting a purchase thereof by the former with the furniture and other personalty in the building, for use and in use by the proprietor in the hotel business, which was somewhat intermixed with other personalty. All except the latter was the subject of the negotiations. The result was that plaintiff bargained, verbally, to pay for the entirety, $4,000, possession to be delivered to her July 1, 1912. Pursuant to the verbal agreement the property was, by warranty deed, conveyed to plaintiff April 5, 1912, the deed specifying the date for delivery of possession and, in order to enable the purchaser to identify and separate her personal property in the house from that not owned by the seller, an old list which the latter had was attached to the deed and referred to in these words, following the description of the hotel premises: "known as the Richards House, together with all the personal property contained in seventeen rooms, kitchen, dining room and pantry in said house as per inventory hereto attached." Thereafter and, while the vendor was yet in possession she verbally sold the scales to a third party. Without disturbing them the purchaser resold. Plaintiff thereafter took possession. The scales were in place then as in the beginning and were being used, as commonly, as part of the hotel property. Plaintiff continued such use for some two weeks without disturbance or notice that an attempt had been made to deprive her of the scales. In the meantime the second purchaser verbally resold the scales to the Oconto Water Supply Company. Thereafter its employees, the defendants, against plaintiff's protest, detached the scales from this land to which

the same were fixed. She then commenced this action to recover possession.

The evidence established, or tended to establish, all matters above stated and this further, though under objection on behalf of defendant that the recitals in the deed were conclusive as to the entire subject of the sale to plaintiff; during the negotiations leading up to the sale and which resulted in the verbal contract, plaintiff inquired about the scales and Mrs. Noel said they went with the property. The trade was verbally closed with that understanding. Later the deed was delivered and consideration paid, plaintiff relying upon Mrs. Noel's representation as to the status of the scales.

During the trial it was taken for granted with the court's approval that the scales, before removal by defendants, were personal property.

The jury found, specially, that, at the time of the verbal contract which resulted in the conveyance by deed being made, it was agreed and understood that the title to the scales would pass as part of the consideration for the $4,000, and found in plaintiff's favor as to all other matters requisite to entitle her to judgment, which was accordingly entered.

For the appellants there was a brief by *Greene, Fairchild, North, Parker & McGillan,* and oral argument by *John W. Gauerke.*

For the respondent there was a brief by *Francis X. Morrow* and *Classon & O'Kelliher,* and oral argument by *D. G. Classon.*

MARSHALL, J. Was error committed by permitting oral testimony as to what was said when the verbal contract was made respecting the transfer of the hotel property to respondent respecting whether the scales would pass to the latter as part of the subject of the sale?

It is contended that the rulings in question violated the principle that all negotiations leading up to and resulting in

a written contract are, subject to some exceptions, conclusively presumed to be merged therein and, therefore, oral testimony, varying or contradicting the writing, is not permissible.

The principle relied on by appellants is familiar. The object thereof is prevention of fraud. Where the object would clearly not be promoted but application of the principle, arbitrarily, would promote instead of protect against a fraudulent purpose the tendency has been to create an exception. In this way, by a long course of judicial administrative experience, several exceptions have been wrought out and restrictive boundaries placed about the rule, illustrating the maxim that, in general, a good rule admits of good exceptions and, necessarily, limitations. In my own judgment the rule under discussion, beneficent as I concede it to be, has quite as much dignity in its exceptions and limitations as in its entirety. The former vindicates that crowning conception of the law which the broadminded courts constantly struggle to vitalize. *Ubi jus, ibi remedium.*

One of the limitations mentioned and so often referred to as an exception as to come to be so regarded, is this: Where the writing is but a part execution of an entire verbal contract; the parties having elected to permit the rest to remain in parol, the question of whether the latter can be established *aliunde* the writing is outside the general rule as to varying, explaining, or contradicting a written contract by oral evidence, and so the prohibition does not reach it. That, however, is limited by the proviso that the part of the entirety not embodied in the writing must not contradict it, nor the writing clearly indicate that it was intended to embody the entire verbal contract. The court below ruled that the limitation of the principal rule, notwithstanding such proviso, applied to the case. It is conceded by counsel for respondent that such ruling would be sound except for the reference in the deed to personal property, but that such reference clearly indicates an intention to embody in the writing the entire contract as to personalty as well as realty.

Whether the circumstance mentioned indicates as claimed, is matter of evidentiary inference. It by no means follows, as matter of course, that because the list of furniture and hotel instrumentalities in particular rooms was mentioned in the deed there was a specific intent to name therein everything of a personal property nature or which might be regarded by either of the parties as personalty but formed a part of the subject of sale. There were many circumstances bearing on the subject, particularly the one that there was personalty in the house other than that owned by defendants and that it was necessary to specify the latter in order that it might be identified from the former. The decision of the trial court on this cannot be disturbed.

Did the evidence as to the scales forming part of the entirety contradict the deed? That may be viewed in two aspects, one assuming that the scales were personalty and the other that they formed a part of the realty. The former, as indicated in the statement, was the viewpoint of the trial court and counsel on both sides below and here.

The condition of a part of an entire verbal contract left in parol while the rest in part execution of the entirety is reduced to writing, being proved, that it must not contradict the writing, should be taken reasonably so as to give efficiency to the limitation stated rather than so narrowly as to afford it no substantial vitality. If we start with a conclusive presumption that the parties to a written contract intended to embody everything of a material nature therein, then proof of anything material in addition would, in a sense, contradict the writing. There must be real contradiction to satisfy the terms of the condition. Where is it in this case? The deed referred to specific personalty in the house. The verbal testimony did not add to it or take from it, and so, strictly speaking, did not contradict it.

A deed being unilateral in character is commonly held to be a mere part execution of an entire verbal contract within the principle we are discussing. There is no very strong

presumption, if any, that it contains or was intended to contain all the verbal agreement preceding it. To give it that character, where otherwise it might be so used as to perpetrate a fraud, requires some pretty clear and satisfactory evidence. There are several decisions of this court under somewhat similar circumstances as those here, where the instrument was held to be a mere partial performance of the entire verbal contract. The trial court was guided there by *Lathrop v. Humble,* 120 Wis. 331, 97 N. W. 905; *Mueller v. Cook,* 126 Wis. 504, 105 N. W. 1054; *Jost v. Wolf,* 130 Wis. 37, 110 N. W. 232; *Ill. S. Co. v. Paczocha,* 139 Wis. 23, 119 N. W. 550.

It is considered that the situation in question is within the principles illustrated in those cases.

The second aspect of this case is so clear, notwithstanding the agreement of counsel and opinion of the trial court that the scales in place were realty, that it might well be decisive of this case regardless of the rule above discussed. Why did not the scales constitute a fixture? That was suggested on the argument and not answered except by the concession made upon the trial and the theory upon which the circuit judge disposed of the case. But, if the evidence conclusively shows that the scales were a part of the realty when the deed was made, no concession by counsel, even indorsed by the trial court, could change the obvious fact.

Fixtures are realty. They pass by transfer of title to the land unless specifically reserved in the writing. Verbal testimony excepting them out of the writing would be a plain case of varying, modifying, or contradicting that which the parties saw fit to create written evidence of.

In general, the characteristics of fixtures are actual physical annexation, though this is not absolutely essential, application to the use for which the realty is devoted, and intention to make the annexation a permanent part of the freehold,—the latter being the controlling element. *Baringer v. Even-*

son, 127 Wis. 36, 106 N. W. 801; *E. M. Fish Co. v. Young,* 127 Wis. 149, 106 N. W. 795. The intention sometimes conclusively appears from circumstances but is a proper subject otherwise for proof by evidence, whether direct or circumstantial, bearing on the question. The circumstance of being an important feature of an entirety for the use to which the realty is devoted, is often of much, and sometimes of conclusive importance on the question of intention. Here there was the physical annexation and adaptability and very strong circumstantial evidence of intention. Under those circumstances it was most natural for plaintiff to speak of the scales during the negotiations to purchase the property. It was up to the seller then to declare whether she considered the scales a part of the realty or not. According to plaintiff's evidence and as the jury found the fact to be, she then said that the scales would go with the property. So the trial court proceeded to a conclusion with that understanding.

Such determination and the subsequent action thereon, if not characterizing circumstances and provable by parol, within the rule often illustrated, *Klueter v. Joseph Schlitz B. Co.* 143 Wis. 347, 359, 128 N. W. 43; *Colt v. Paulson,* 145 Wis. 214, 130 N. W. 55; *Hammond v. Capital City Mut. F. Ins. Co.* 151 Wis. 62, 138 N. W. 92,—to shut out proof of such circumstance and assume that to be personalty which by all physical indications is realty and thus deprive plaintiff of part of what she purchased, would be the plainest kind of a case of permitting the use of a written contract to perpetrate a fraud which forms one of the most notable exceptions to the rule contended for by counsel for appellants, though one, it may be confessed, which needs to be well guarded and applied only within its narrow field. *Jost v. Wolf,* 130 Wis. 37, 110 N. W. 232.

If plaintiff's vendor had not said anything about the scales at the time of the trade they would have passed by the deed not as personalty but as realty seems plain on principle, but it

is supported by abundance of authority. Bronson, Fixtures, p. 165, note 46; *Arnold v. Crowder,* 81 Ill. 56; *Dudley v. Foote,* 63 N. H. 57; *Bliss v. Whitney,* 9 Allen, 114; *McGorrisk v. Dwyer,* 78 Iowa, 279, 43 N. W. 215; *Thomson v. Smith,* 111 Iowa, 718, 83 N. W. 789.

The only limitation found mentioned in the books is in *Union Cent. L. Ins. Co. v. Taggart,* 55 Minn. 95, 56 N. W. 579—an authority not followed anywhere that I can find. It went upon the ground that the scales, being within the street, were presumably there by mere revocable permission of the municipality, which in the absence of evidence to the contrary would indicate, clearly, want of intention to create a permanent addition to the abutting property. There is evidence to the contrary here in the declaration of the seller at the time of the trade which, by the plainest principles of good faith, she estopped herself from denying. But the Minnesota case is directly contrary to *Dudley v. Foote, supra,* and *Bliss v. Whitney, supra.* In both cases the scales were located outside the lot line. To the same effect is *Redlon v. Barker,* 4 Kan. 445, where a hotel sign-post and sign located in front of the hotel and some eight feet outside the lot line was held to be part of the hotel property and to have passed by the deed of it.

It was suggested on the argument that the trial court was influenced to the conclusion that the scales were not a part of the real estate because the description was by metes and bounds, the side towards the scales being so described as to show that it followed the lot line. We shall not spend time with that. It is elementary that a sale and conveyance of realty abutting upon a street, in the absence of clear express indications to the contrary, includes to the center of the street. Elliott, Roads & Streets (2d ed.) § 886; *Pettibone v. Hamilton,* 40 Wis. 402; *Kneeland v. Van Valkenburgh,* 46 Wis. 434, 1 N. W. 63. So the scales in this case were located on the land conveyed to plaintiff. She owned it subject to the

public right to use it for street purposes as completely as she did the land inside the lot line. She having sold and conveyed the property as the jury found she did, evidence that she claimed the scales to be personalty clearly contradicts the deed, while evidence that she then disclaimed on the question is confirmatory instead of contradictory of the writing.

It follows that if the trial court erred as appellants claim,—and it is considered to the contrary,—it is manifest that the title to the scales passed to plaintiff as part of the land conveyed.

By the Court.—The judgment is affirmed.

TIMLIN, J. I concur in the result.

BARNES, J. I concur in affirmance on the second grounds only stated in the opinion.

ROGERS, Appellant, vs. HOLLISTER and another, Respondents.

February 27—March 17, 1914.

Divorce: Effect of judgment when entered: Wills: Construction: "Husband."

1. *It would seem* that a judgment of divorce granted pursuant to sec. 2374, Stats., is effectual when entered to dissolve the marriage contract, subject to the conditions prescribed in the statute.
2. Where, while an action by a husband for a divorce was pending, the wife made her will giving her personal property to him "providing he is my husband at the time of my decease," and within a year after judgment of divorce was granted pursuant to sec. 2374, Stats., the wife died, it is *held* that he was not, within the meaning of the will, her husband at the time of her decease.

APPEAL from a judgment of the circuit court for Walworth county: E. B. BELDEN, Circuit Judge. *Affirmed.*

On September 19, 1911, *Fred L. Rogers,* husband of

Martha A. Rogers, commenced an action for divorce against his wife, said Martha A. Rogers. While the action was pending and on October 27, 1911, said Martha A. Rogers made her will which contains the following:

"If *Fred Rogers* is my husband at my decease, I give, devise and bequeath to him all of my personal property absolutely, and the right to use and occupy my residence where I now reside for and during his natural life, providing he is my husband at the time of my decease. . . .

"I nominate *Fred Rogers,* my husband, executor of this my will without bonds, provided he is my husband at my decease."

Judgment was entered in the action above mentioned January 9, 1912, which provided:

"It is ordered, adjudged, and decreed, as and for an interlocutory judgment herein, that the marriage and bonds of matrimony between the plaintiff, *Fred L. Rogers,* and the defendant, Martha Alice Rogers, be and the same are hereby dissolved, and each of the parties hereto is forever freed therefrom.

"It is further ordered, adjudged, and decreed that the plaintiff deliver to the defendant all their household goods and fixtures now in their home in the city of Delavan, Walworth county, Wisconsin, and also that the plaintiff pay to the defendant seven hundred dollars ($700) in cash, and that he give to the defendant two notes of five hundred dollars ($500) each, one due in one year from the date thereof, and the other due in eighteen months from the date thereof, with interest on each of said notes at the rate of six per cent. per annum.

"And it is further ordered, adjudged, and decreed that when the said articles of furniture and fixtures have been delivered and the payment of money made and the said notes given, as described in the findings in this action, by the plaintiff to the defendant, the same shall be a final division of the property of the plaintiff between the parties hereto.

"And it is further ordered, adjudged, and decreed that upon the application of either party to this action, made after the expiration of one year after the entry of this interlocutory judgment, or after the last modification or revision

thereof, if any be made, a final decree of divorce may be entered in said action as by law in such case made and provided."

Martha A. Rogers died December 26, 1912. The only question here involved is whether *Fred L. Rogers* was at the time of the death of Martha A. Rogers her husband within the meaning of her will.

The question arose on application for the appointment of an administrator of the estate of Martha A. Rogers, deceased, in the county court of Walworth county. The county court held that *Fred L. Rogers* was the husband of Martha A. Rogers, deceased, and ordered that letters of administration be granted to him. On appeal the circuit court reversed the judgment of the county court and directed that letters of administration issue to *James R. Williams,* father of deceased. This appeal is from the judgment of the circuit court.

Geo. G. Sutherland and *Charles E. Pierce,* for the appellant.

E. L. von Suessmilch, attorney, and *John B. Simmons,* of counsel, for the respondents.

KERWIN, J. In the consideration of the question involved in this case it will be well to refer briefly to the statutes bearing upon the subject.

Sec. 2330, Stats., prohibiting marriage under certain circumstances, was amended by ch. 271, Laws of 1901, by adding thereto a provision to the effect that it shall not be lawful for any person divorced to marry again within one year from the date of the entry of such judgment, and that the marriage of any divorced person within one year from the date of the entry of such judgment shall be null and void, but upon application of such divorced person the court granting the divorce may authorize the marriage of such person within the year. This statute was again amended by ch. 456, Laws of 1905, so as to provide, in effect, that it shall not be

lawful for any divorced person to marry again within one year from the date of entry of such judgment, and that the marriage of any divorced person solemnized within one year from the date of such judgment of divorce shall be null and void; and providing further that the circuit judge who granted the divorce, upon application of both parties, may by order authorize the remarriage of such divorced persons to each other within the year. Ch. 323, Laws of 1909, made several provisions and amendments to the law on the subject of divorce, and among others sec. 2360*k*, which provided in effect that in every action for divorce in which it should be determined that a divorce be granted, an interlocutory judgment shall be entered which shall fully determine the rights of the parties, provide for the care, custody, and maintenance of the minor children, fix the amount of alimony, etc., and that such judgment shall determine the status of the parties, but such determination of the status shall not be effective, except for the purpose of an appeal to review the same, until after one year from the date when such interlocutory decree was entered; that any of the provisions of such interlocutory judgment may be reviewed by appeal within one year from the date of such interlocutory judgment or from the date of the last modification or revision of the same, if modified or revised after it is first entered. Also, sec. 2360*l*, which provided that at the expiration of one year from the entry or from the date of last modification of such interlocutory judgment the final judgment may be entered, unless such interlocutory judgment shall have been reversed or so modified on appeal as to prevent entry of such final judgment, unless the court, for sufficient cause, upon its own motion or upon the application of a party, shall otherwise order before the expiration of such period, and that if an appeal from such interlocutory judgment be pending at the expiration of said year, no final judgment shall be entered until such appeal shall have been finally determined.

Other changes were made by the legislature in 1911 (ch. 239), which left the law on the subject as follows:

"Sec. 2374. 1. When a judgment of divorce from the bonds of matrimony is granted in this state by a court, such judgment, so far as it determines the status of the parties, shall not be effective, except for the purpose of an appeal to review the same, until the expiration of one year from the date of the entry of such judgment.

"2. So far as said judgment determines the status of the parties the court shall have power to vacate or modify the same, for sufficient cause shown, upon its own motion, or upon the application of either party to the action, at any time within one year from the entry of such judgment. But no such judgment shall be vacated or modified without the service of notice of motion, or order to show cause on the divorce counsel, and on the parties to the action, if they be found. If the judgment shall be vacated it shall restore the parties to the marital relation that existed before the entry of such judgment.

"3. It shall be the duty of every judge, who shall enter a judgment of divorce, to inform the parties appearing in court that the judgment, so far as it affects the status of the parties, will not become effective until one year from the date when such judgment is entered.

"4. Such judgment, or any provision of the same, may be reviewed by an appeal taken within one year from the date when such judgment was entered. At the expiration of such year, such judgment shall become final and conclusive without further proceedings, unless an appeal be pending, or the court, for sufficient cause shown, upon its own motion, or upon the application of a party to the action, shall otherwise order before the expiration of said period. If an appeal be pending at the expiration of said year, such judgment shall not become final and conclusive until said appeal shall have been finally determined."

It will be seen that by the amendments made in 1911 the provision in ch. 323, Laws of 1909, respecting the entry of an interlocutory judgment was dropped out and other changes made.

Sec. 2374, Stats., does not make plain just what the status of the parties is during the year after judgment. True, it provides that the judgment, so far as it determines the status of the parties, shall not be effective, except for the purpose of an appeal to review the same, until the expiration of one year from date of entry, and that so far as it determines the status the court shall have power to vacate or modify it at any time within one year, and if the judgment shall be vacated it shall restore the parties to the marital relation that existed before the entry of the judgment. The statute makes it the duty of the judge who shall enter the judgment to inform the parties that the judgment, so far as it affects the status of the parties, will not become effective until one year from date of entry. It further provides that the judgment may be reviewed by appeal within one year, and at the expiration of one year shall become final without further proceedings unless an appeal be pending or the court shall otherwise order before expiration of said period.

Now it is contended by appellant that the judgment here entered was not effectual to dissolve the bonds of matrimony until the expiration of one year from date of entry; therefore, at the time of the death of Martha Alice Rogers the appellant, *Fred L. Rogers,* was her husband. On the part of the respondents it is insisted that the judgment dissolved the marriage contract at the date of entry, subject to revision within one year, and conditions specified in the statute; and that in any event the appellant was not the husband of Martha Alice Rogers at the time of her death within the meaning of her will.

We need only consider the latter proposition in this case, namely, whether *Fred L. Rogers* was the husband of Martha at the time of her death within the meaning of her will. While the divorce action had been commenced shortly before the will was executed, it is plain from the record that Martha was opposed to the divorce and desired a reconciliation; but

the appellant persisted and the judgment was entered contrary to the wish of the wife. Whether the judgment dissolved the marriage contract when entered, subject to modification within the year, or whether it became effectual to dissolve the contract at the end of the year, it was at least a conditional judgment, which without further action upon it would automatically become final and conclusive at the end of one year from its entry. So it would seem that when Martha Alice Rogers made her will bequeathing property to *Fred L. Rogers* if he should be her husband at the time of her death, she meant that she gave the property to him if no divorce was granted. It does not seem that she intended to give her property to him if he had a judgment of divorce entered against her which would at least be final and conclusive one year from the date of entry unless otherwise ordered. She doubtless meant a "duly commissioned husband," with all the rights and privileges and charged with all the duties and obligations of a real husband in law and in fact. Whatever the effect of the judgment may have been under the statute when entered, it at least impaired the relation which formerly existed between *Fred L. Rogers* and Martha Alice Rogers as husband and wife and severed the social if not the legal relation which formerly existed between them. We therefore conclude that *Fred L. Rogers* was not, at the time of the death of Martha Alice Rogers, her husband within the meaning of the will.

The history of legislation on the subject and the statute as left by ch. 239, Laws of 1911 (sec. 2374, Stats.), would seem to indicate that it was the intention of the legislature that the entry of judgment should dissolve the marriage contract, subject to the conditions prescribed by the statute, but this we do not decide. It follows that the judgment of the court below must be affirmed.

By the Court.—The judgment of the court below is affirmed.

The following opinion was filed March 23, 1914:

MARSHALL, J. (*concurring*). In harmony with what I have several times said, I think the court should now decide the question of whether under sec. 2374, Stats., the parties to a divorce action are man and wife during the waiting period after judgment, except as regards remarrying. That is a very important matter. The public interests require all uncertainty in respect to it to be set at rest at the earliest possible moment. Serious consequences to many innocent persons and to the social state, in general, are within reasonable probabilities so long as the ambiguity left in the statutes remains unsolved. There is opportunity to solve it now. The matter has been well presented by counsel. We are as able to decide upon it now as we ever will be. Judicial duty, from my viewpoint, requires action without hesitation. The one who speaks for the court inclines to that view, as will be clearly seen by the opinion closing the case.

What does the statute mean by the language: "Such judgment, so far as it determines the status of the parties, shall not be effective, except for the purpose of an appeal . . . until the expiration of one year from the date of the entry . . ." Looking at that, by itself, one would, unhesitatingly, say, that the legislative idea was a judgment in form only for a waiting period of one year; the parties to be nevertheless man and wife, in fact, the same as if no judgment had been entered.

The history of the legislation on the subject, as indicated by the opinion of the court, shows that the real purpose of the legislature has been to prevent remarriage until the expiration of one year after promulgation of the result of the divorce trial. The term "status" was used, which has a well known technical meaning in regard to the social relations. It stands, where used in respect to the condition of marriage, for a thing, not physical, but incorporeal; the existence of a

condition embodying all the elements of the social relation in the marriage state; the condition of the parties in respect to their legal relations, one to another, to the family, and to organized society.

Words of a statute, having a well known technical meaning in the law, are presumed to have been used in that sense; but such presumption is by no means conclusive. If the statute, as a whole, shows, clearly, that some other reasonable meaning was intended, then it must be so treated; since, under all circumstances, the legislative will, if discoverable, should prevail.

So, as indicated, if we are to look no further than the language I have quoted, there would be no escaping the conclusion that, though a divorce judgment, in form, in the most positive terms, as in this case, dissolves a marriage contract, such contract yet subsists as before for the period of one year. No event short of a vacation of the judgment could be said to, logically, restore the marriage state, because of the condition not having been created admitting of any such operations as that of restoration.

Now turning to the second subdivision of the statute we read: "If the judgment shall be vacated *it shall restore the parties to the marital relation that existed before the entry of such judgment.*" How is that? How can the "marital relation that existed before the entry of such judgment" be restored if never displaced? Restoration implies, necessarily, prior existence and an interim of nonexistence.

Are not the two parts of the statute, in their literal sense, fatally contradictory? It seems so. That the legislature did not intend any such absurd result, we must assume. If we can see any reasonable way out of the dilemma,—the situation created by the crude work of those responsible for the manner of vitalizing the idea of the lawmakers, it is a judicial duty to adopt it.

Here we have a good example of the difficulties cast upon

the court by inefficient efforts to clearly state a legislative purpose. Difficulties of that kind, seemingly, have greatly increased in recent years, over and above such as were incident to legislation when lawmakers depended upon themselves for the framing and shaping of laws.

I see no way of minimizing or changing, in any way, the ordinary meaning of the words of sub. 2 of the section under consideration. Therefore the way out of the difficulty must be sought by minimizing the ordinary meaning of the language in the first part of the section, so that it will convey the idea of a termination of the state which the second subdivision declares a vacation of the judgment "shall restore." There is no very great difficulty in so minimizing the term "so far as it determines the status of the parties shall not be effective." It may be restrained to mere capacity to remarry,—the status of marriageability,—so restrained within the reasonable meaning of the word "status" or by reading words, as in place, which are there by necessary implication. Either is a perfectly legitimate method of judicial construction. *Neacy v. Milwaukee Co.* 144 Wis. 210, 217, 128 N. W. 1063.

Status with reference to the marriage relations, in general, means the entirety, the marriage state with all which the name implies; but, after all, it is the mere method of stating a condition. So it may be appropriately used with reference to the marriage state, or with explanatory context, a minor condition of it. A condition as to marriageability, is a status in a proper sense. Unless the word be so restrained, in this instance, there is an irreconcilable conflict in the statute which would require its condemnation as void for uncertainty. It seems that the legislature must have used the term "status" in the limited sense mentioned, and have had that in mind in declaring that a vacation of the judgment shall operate to restore the marital relations that existed before the entry of the judgment.

Reading the two provisions together, by necessary inference, the modifying phrase, as regards capacity to remarry, or some similar words, in effect, are in place after the word "status." So, in my judgment, upon the entry of a divorce judgment, as in this case, the parties cease to be man and wife; their former status is not affected, for the time being, as to marriageability; but otherwise their condition is entirely changed. Cohabitation between them during the period of waiting would be adultery and marriage of either person to a third person would be bigamy.

Upon the ground stated I concur in the judgment in this case.

LINDEN, Administratrix, Respondent, vs. MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, Appellant.

September 17, 1913—April 9, 1914.

Railroads: Killing of traveler at highway crossing: Signals: Positive and negative testimony: Contributory negligence: Failure to look.

1. In an action for the killing of a person by a railway train at a highway crossing, the positive testimony of the trainmen, corroborated by that of four disinterested witnesses, that the engine bell was rung continuously as the law requires, is *held* to establish that fact conclusively, as against the negative testimony of witnesses who were not giving their attention to the observation of that fact, but to other matters.
2. Evidence in such case that the deceased had ample opportunity to observe the approaching train as he drove his team toward the track from a point 133 feet distant therefrom, his view being intercepted only for a small part of that distance before reaching a point forty-five feet from the track, from which latter point he had a continuous, clear, open view of the train, and that he neither stopped, looked, nor gave any attention to the train while driving from said point to the track, but manifested the heedlessness of an intoxicated person,—is *held* to show, as matter of law, that his want of ordinary care proximately contributed to cause his death.

APPEAL from a judgment of the circuit court for Taylor county: G. N. RISJORD, Circuit Judge. *Reversed.*

This is an appeal from a judgment entered in favor of the plaintiff for the sum of $3,500 and costs upon a verdict in plaintiff's favor for damages for the death of her husband, who died from injuries received by him in a collision with one of defendant's freight trains on a crossing of defendant's railroad and a highway in the town of Westboro.

Westboro village is an unincorporated village in Taylor county. The railroad crosses the main street of the village at right angles, the railway running from north to south and the highway east and west. It appeared by the evidence that at the place in question the decedent approached the track from the west. The street was free from other teams and vehicles. After decedent passed a millinery store situated 133 feet west from the crossing there was an open view for some 700 to 800 feet to the north along the railroad right of way to a cut, intercepted only by a beer house situated 200 feet north of the crossing and a box car standing on a siding half way between the beer house and the crossing. These two objects partially intercepted his view of the train while he was driving from a point 133 feet west of the crossing to a point forty-five feet from the crossing, and thereafter there was nothing to obstruct his view for a distance of 630 feet north along the track and of trains thereon. It appears that deceased was somewhat hard of hearing and had on the day of the accident been drinking liquor in sufficient quantity to intoxicate him to some extent, and that he drove from a point some 100 feet west of the crossing to a point within forty-five feet of the track without stopping. The engine struck the rear part of the bob-sleighs upon which Linden was riding, throwing him some twenty feet and killing him almost instantly.

The complaint charges the defendant with negligence in failing to sound the whistle or to ring the bell and in running

its train over this crossing at an excessive rate of speed, and that such negligence was the proximate cause of Linden's death. The defendant alleges that the train was not running to exceed twenty-five miles per hour and that the required signals were given as the train approached the crossing, and denied that the train was operated at an excessive rate of speed.

The evidence upon which the plaintiff depends to show that the engine bell was not rung was given by the following witnesses sworn in her behalf: Bergman, Wennerstrand, Roinilla, and Lopno. The witness Bergman stated that he was hitching his horse in front of the Carlson and Dahl store, 360 feet from the crossing, when he witnessed the accident. He saw Linden's team and sleigh when struck by the engine, and says: "They were just going across the track, going east. The whistle was blown just a moment before he was struck. The train was then at the cattle chute, 500 feet from the crossing;" and he further states that that was the only place it did blow. In answer to an inquiry whether the bell was ringing as the engine approached the crossing he said: "It did not ring. I was 360 feet from the crossing. Nothing between me and the track to interfere with my seeing and hearing." He further states that the alarm whistle was the first thing that attracted his attention to the train, which was about 500 feet north of the crossing; that he did not hear anything before that nor think anything about the approaching train. To the question whether he was able to hear anything else while the whistle was blowing he answered: "No, I could not hear anything else." He further testified that he did not think the bell was ringing while the whistle was sounding and that he saw no motion of the bell.

The witness Wennerstrand testified that the first he noticed of the approaching train was when he heard the danger signal blown about 500 feet from the crossing, and that at that time he was about sixty rods from the track driving

his team parallel with the track toward Center street, which crossed the track and on which Linden was driving; that he had paid no attention to the train before the whistle sounded and that he did not hear the bell ringing.

The witness Roinilla testified that she heard the danger whistle while in the postoffice some 103 feet north of Center street; that she rushed out and ran to Center street and was then very close to the track and saw the accident, and that the bell was not ringing. She also stated the bell could not be heard while the whistle was blowing.

The witness Lopno testified that she was in her house on the second floor over Lopno's saloon, which is about 133 feet from the crossing; that she heard the train whistle but did not hear the bell ringing; that she paid no attention to the train before it whistled nor had she noticed it.

Six disinterested persons besides the train crew testified to hearing the train whistle before they heard the danger signal, and four of them testified that the bell was ringing all the time as the engine approached the crossing and until it stopped after striking Linden.

The jury found that the whistle was not blown eighty rods from the crossing, and that the failure to blow the whistle was the proximate cause of the death of Linden. On motion after verdict the court held that the evidence showed that the whistle was blown eighty rods from the crossing, and changed the jury's finding on these issues accordingly. The jury further found that the engine bell was not rung while approaching and passing over this crossing before colliding with Linden; that the train, while approaching and passing this crossing, was running at an excessive and negligent rate of speed, to wit, forty miles per hour, and that the failure to ring the engine bell and the running of the train at the excessive rate of speed were the proximate cause of the collision of the engine with Linden and his team; and awarded damages to plaintiff to compensate her for the pecuniary loss

she had suffered on account of Linden's death. The jury also found that Linden was not guilty of gross negligence nor of a want of ordinary care in driving onto the crossing as he did while the train was approaching and about to collide with him. The court awarded the plaintiff judgment upon the verdict for recovery of the damages as found. This is an appeal from such judgment.

For the appellant there was a brief by *Luse, Powell & Luse,* attorneys, and *Alfred H. Bright* and *John L. Erdall,* of counsel, and oral argument by *L. K. Luse.*

For the respondent the cause was submitted on the brief of *W. P. Crawford* and *John R. Heino.*

The following opinion was filed October 7, 1913:

SIEBECKER, J. The appellant assails the ruling of the trial court in refusing to grant its motion to reverse the jury's finding that the bell was not rung. We have referred in detail to the evidence of the witnesses on whom the plaintiff relies to support the jury's finding on this issue. An examination thereof shows that these witnesses were not giving their attention to observe whether or not the bell was ringing when the train approached the crossing and that their attention was directed to other matters. The most that can be claimed to sustain plaintiff's contention on this point is that these witnesses did not hear the bell ringing. The witness Bergman, who stated that he was in a position to see and hear the bell, also states that he heard the whistle almost continuously and that he could not hear the bell ring when the whistle was sounded. The evidence is clear, as the court found, that the whistle was almost continuously sounded from the time that Linden was so situated that he could see the approaching train until the collision occurred. The engineer, fireman, and brakeman who rode on the engine testify positively that the bell was continuously rung, as the law requires, from the time the crossing signal was given until

the collision occurred. Their evidence is corroborated by four disinterested witnesses, who testify that they heard the bell ringing and that they were so situated that they could hear it and had their attention directed to this fact. The witnesses upon whom the plaintiff relies to establish this fact testify only negatively. Their narrative of the events discloses that their attention was not directly given to the observation of this fact and that they were giving closer attention to other matters within the field of their observation. The negative character of the evidence in support of this finding of the jury is wholly insufficient to sustain it in the light of the positive testimony to the contrary. We are led to the conclusion that the trial court should have granted plaintiff's motion to change the jury's answer to the question in the verdict covering this issue. *Jordan v. Osborne,* 147 Wis. 623, 133 N. W. 32; *Sutton v. C., St. P., M. & O. R. Co.* 98 Wis. 157, 73 N. W. 993; *Wickham v. C. & N. W. R. Co.* 95 Wis. 23, 69 N. W. 982. From the foregoing it results that all questions of negligence charged as the proximate cause of Linden's death, except the negligent running of the train, drop out of the case. The question of Linden's gross negligence as a contributing cause to proximately produce his death is also immaterial in view of our conclusion upon the point of his want of ordinary care.

The jury found that the defendant company was negligent in running its train over the crossing in question at a dangerous rate of speed and that such negligence was the proximate cause of Linden's death. This brings us to the consideration of the question presented by the defendant's exceptions: Does the evidence show as a matter of law that Linden was guilty of a want of ordinary care which proximately contributed to produce his death? The facts are practically without dispute and tend to show that the decedent had ample opportunity to observe the approaching train as he drove toward

the track from a point 133 feet distant therefrom, and that his view could be intercepted only for a small part of this distance by the beer house and car before reaching a point forty-five feet from the track, from which point he had a continuous, clear, open view of the approaching train. The claim that piles of railway ties interfered with his view within this forty-five foot space is not sustained, as these piles of ties were not high enough to interfere with seeing the approaching train. The only reasonable explanation of his collision with the train, in the light of the situation and Linden's ability to see it, is that he omitted to look for it, or, if he did look and see it, that he recklessly drove onto the track when the train was so near as to be obvious that it must collide with him. In addition to these facts and circumstances shown by the situation, we have the evidence of witnesses to the effect that they saw and observed that he neither stopped, looked, nor gave any attention to the train in driving onto the track from the point forty-five feet west of it; and that he manifested the heedlessness of an intoxicated person in the presence of imminent peril to his life. In no conceivable way does the evidence permit of an interpretation from which the inference could be drawn that he exercised ordinary care in approaching the crossing and in driving onto it in view of the peril of being run down by the train. It is plain that he was guilty of a want of ordinary care and prudence in driving onto the track as he did and that such want of care proximately contributed to cause his death. The inevitable conclusion necessarily follows that the court erroneously refused to grant defendant's motion to so find as a matter of law and to change the answers to the questions accordingly. The answers to the questions of the verdict should have been changed as requested by defendant's motion, and upon the verdict so modified judgment dismissing the complaint should have been awarded.

By the Court.—The judgment appealed from is reversed, and the cause remanded with directions to change the answers to the questions as indicated in the opinion and thereupon award judgment dismissing the plaintiff's complaint.

A motion for a rehearing was denied, with $25 costs, on April 9, 1914.

TRIPP, Respondent, vs. FOSTER, imp., Appellant.

February 26—April 9, 1914.

Principal and agent: Sale of pledged stock by agent of pledgor: Fraud: Ratification: Liability of pledgee.

Defendant, the holder of a note given by a corporation, held stock of the corporation as collateral security. An agent of the corporation, who did not act or assume to act as agent of defendant, sold a part of said stock to the plaintiff by means of fraudulent representations as to its value. Defendant took no part in the sale and had no knowledge of the fraud; but on receiving from the corporation the proceeds of the sale he assigned and surrendered the shares so sold. *Held*, that he did not thereby ratify the acts of the agent of the corporation so as to become liable either to return the consideration paid by the purchaser or to answer in damages for the fraud. MARSHALL, J., dissents.

APPEAL from a judgment of the circuit court for Fond du Lac county: CHESTER A. FOWLER, Circuit Judge. *Reversed.*

This action was brought to recover on two alleged causes of action, $1,000 on the first and $500 on the second, alleged to have been procured from the plaintiffs by fraud in the sale of a portion of the capital stock of the Bates-Odenbrett Automobile Company, a corporation. The sale was made by one Bates, and it is claimed that he was acting as the agent of defendant *Foster* in making such sale.

Foster answered denying specifically that Bates was his agent or had any authority to act for him, that he received any benefits from the acts of Bates, that he was the owner of

any of the stock in the alleged corporation, and denying generally other allegations of the complaint.

The jury returned the following verdict:

"(1) Did Mr. Bates, to induce *Mr. Tripp* to purchase the stock, represent to him, in substance, that the company was then doing a successful and profitable business? *A.* Yes.

"(2) Was such representation false? *A.* Yes.

"(3) If false, did Mr. Bates know it to be false? *A.* Yes.

"(4) If false, then ought Mr. Bates to have known it was false? *A.* Yes.

"(5) Did *Mr. Tripp* rely on such representation? *A.* Yes.

"(6) Was *Mr. Tripp* induced by such representation to purchase the stock? *A.* Yes.

"(7) Did Mr. Bates, to induce *Mr. Tripp* to purchase the stock, represent to him, in substance, that the company had paid fifteen to twenty per cent. dividends annually since its organization? *A.* Yes.

"(8) Did *Mr. Tripp* rely on such representation? *A.* Yes.

"(9) Was *Mr. Tripp* induced by such representation to purchase the stock? *A.* Yes.

"(10) Did Mr. Bates, to induce *Mr. Tripp* to purchase the stock, point out to him the automobiles in the salesroom and say to him that they all belonged to the company and were all paid for? *A.* Yes.

"(11) Was such representation false to any material degree? *A.* Yes.

"(12) Did *Mr. Tripp* rely on such representation? *A.* Yes.

"(13) Was *Mr. Tripp* induced by such representation to take the stock? *A.* Yes.

"(14) What was the stock worth at the time of the purchase? *A.* Nothing.

"(15) What would the stock have been worth had such of these representations been true as you find were made and were false? *A.* One thousand ($1,000) dollars."

The defendant *Foster* insists that a verdict should have been directed, or a nonsuit granted as to him, or judgment should have been rendered in his favor notwithstanding the verdict.

Judgment was entered against the defendants for $1,138

damages on the first cause of action and costs, from which judgment the defendant *Foster* appealed to this court.

For the appellant there was a brief by *T. L. Doyle,* attorney, and *Marshutz & Hoffman,* of counsel, and oral argument by *Mr. Doyle* and *Mr. J. H. Marshutz.*

Andrew Gilbertson, for the respondent.

KERWIN, J. It is established by the evidence that the defendant *Foster* held the stock in question as collateral security to a note of the "Bates-Odenbrett Automobile Company," of which one Dr. E. W. Timm was president and the defendant Bates was secretary and treasurer from 1905 to 1912, and severed his official relations in January, 1912. On the back of the notes of said corporation was the indorsement of said Timm and Bates. On receipt of the collateral stock the defendant *Foster* executed the following:

"I hereby agree on the payment of a certain sum of five thousand dollars ($5,000) together with the interest as specified by one certain note of five thousand dollars ($5,000) due October first, 1911, to deliver to the Bates-Odenbrett Auto Company stock certificate number eight (8).

"J. W. FOSTER."

Bates made the representations to plaintiff about a month before plaintiff bought the stock. The $1,000 received by Bates from plaintiff went to the Bates-Odenbrett Automobile Company at Milwaukee, and later in May, 1911, the Bates-Odenbrett Automobile Company sent a check for $1,000 to the defendant *Foster* to apply on the $5,000 note, and sent four notes of $1,000 each, which with the $1,000 cash took up the $5,000 note.

It is established by the evidence and so found by the learned trial judge in his opinion that defendant *Foster* had no knowledge of any representations made by defendant Bates; that *Foster* did not own the stock, but merely held it as collateral security and had it in his possession at the time of sale, and upon being informed by Bates of its sale executed

an assignment and sent it to Bates, who filled in the name of the purchaser and delivered it and received $1,000, which was paid to defendant *Foster* and credited upon the debt which the stock in part secured.

Upon the facts above stated and others found by the jury the court below held that the defendant *Foster* was liable for the fraud of Bates. *Foster* was not the owner of the stock. He merely held it in pledge as security for the debt of the Automobile Company to him. Bates sold the stock as the agent of the Automobile Company, which was the owner subject to the pledge. The Automobile Company redeemed the pledge and got possession of the stock by paying its value, or supposed value, to *Foster,* which was credited upon the debt. What the Automobile Company did with the stock after it was turned over to it through Bates was a matter of no concern to *Foster.*

But the court below seems to have rested *Foster's* liability on the question of agency, namely, that by receipt of the $1,000 *Foster* ratified the sale and made Bates his agent. But the record shows that Bates was not the agent of *Foster* for any purpose, either by appointment or by ratification. It is clear from the undisputed evidence that *Foster* never appointed Bates as his agent to sell the stock, and he could not be bound by ratification of Bates's fraud, because he had no knowledge of it and was in no way implicated in it or connected with the sale made by Bates.

We think it clear upon principle and authority that Bates was not the agent of *Foster* for any purpose. *Clark v. Dillman,* 108 Mich. 625, 66 N. W. 570; *Deering v. Starr,* 118 N. Y. 665, 23 N. E. 125; 31 Cyc. 1632, 1644; *Emmons v. Dowe,* 2 Wis. 322; *McGoldrick v. Willits,* 52 N. Y. 612; *First Nat. Bank v. Bentley,* 27 Minn. 87, 6 N. W. 422; *Gifford v. Landrine,* 37 N. J. Eq. 127.

The theory of the court below obviously was that when *Foster* received the $1,000 he ratified the acts of Bates re-

specting the fraud in the sale of the stock. But *Foster* could not, by merely accepting the $1,000 due him from a third person, make the agent of such third person his agent or ratify an agency which was never attempted and which never existed, nor the fraudulent acts of one who was not his agent, as to false representations of which he had no knowledge. But *Foster* received the $1,000 from his debtor, the corporation, and not from Bates, although the latter may have been the agent of the corporation in paying to *Foster* the money due him. The fact that it was a part payment, accompanied with a request that the security be split up and some of the shares retained by *Foster* as security for the balance due, cannot change the ordinary effect of the payment by a debtor to his creditor. The latter is not bound to inquire how his debtor got the money so long as it was at the time of payment the money of the debtor. 31 Cyc. 1251. The plain situation is that *Foster* surrendered the stock held as collateral, receiving the agreed value, which was credited on the debt of the owner of the stock, and had no connection with the fraud committed by Bates, and had no knowledge of it when he surrendered the stock. Under such circumstances no case is made against the defendant *Foster*. Other questions discussed by counsel for appellant need not be treated.

By the Court.—The judgment is reversed, and the cause remanded with instructions to enter judgment for the defendant *Foster* dismissing the complaint as to him.

The following opinion was filed April 16, 1914:

MARSHALL, J. (*dissenting*). I dissent from the decision in this case, and more particularly, from the reasoning upon which it is based. I apprehend I am not alone in regard to the latter.

To give a clearer view of the facts than the court's statement affords I will give them as they appear to me. Defendant held $5,000, par value, of the corporate stock of the

Automobile Company of which Bates was manager. It was important for the company; but more particularly for appellant, to realize on the stock. It was for sale for the purpose of paying a debt to appellant who held the stock as pledgee but possessed the legal title thereto. Bates, as manager of the company, and without the knowledge of appellant, assumed authority to sell the stock and did so, depending upon appellant to ratify the sale by turning over the certificate, properly indorsed, so the title could be vested in respondent, the vendee, in consummation of the sale. Such consummation took place by means of fraudulent representation made by Bates. He did not pretend to own the stock or that it belonged to his company. He stated that it was in the hands of a third party from whom he could get it so as to complete the sale. By means of the fraud, respondent's money was obtained and paid over to the company to be rendered to appellant, as owner of the stock, after consummation of the sale. Appellant was notified of the sale agreement and requested to indorse and turn over the certificate so as to enable the company to make delivery upon such agreement. He complied, and later received the consideration from the company which respondent had paid to it. Up to this time appellant was ignorant of the means employed to effect the sale. Later that was brought to his attention and a return of the consideration parted with by respondent demanded. With full knowledge of the facts restitution was refused. Then this action was brought.

Now why does not the principle, with which I suppose all are familiar, apply in favor of respondent? The trial court so decided, reasoning from numerous decisions of this court, as we shall see. Here is the rule as commonly stated:

"A person is liable for the fraudulent act of his agent in the conduct of his business whether he authorized such acts originally or adopted them by taking the benefit of the act with knowledge of the facts or retained such benefit with such knowledge, or was enriched by such act without original

or subsequent knowledge of the wrong committed in his interest."

"A person cannot retain the avails of an unauthorized contract, made for his benefit by another assuming to act as his agent, and repudiate the responsibilities of such contract, and any attempt to do so, with full knowledge of the facts, constitutes a ratification of the unauthorized act, and creates a liability on the part of such person to the same extent as if such contract were originally authorized." *McDermott v. Jackson,* 97 Wis. 64, 76, 72 N. W. 375.

One cannot have the benefit of a transaction and repudiate its responsibilities. Ratification of the assumption of authority as to the principal thing by taking the benefit of the transaction and retaining the same with knowledge of the facts ratifies not only such principal thing but the manner of acquiring it. If the taker insists upon vitality of the major element he subjects himself to the subsidiary features as regards civil remedies. *Fraser v. Ætna L. Ins. Co.* 114 Wis. 510, 517, 90 N. W. 476; *Glassner v. Johnston,* 133 Wis. 485, 493, 113 N. W. 977; *Stelting v. Bank of Sparta,* 136 Wis. 369, 371, 117 N. W. 798; *Twentieth Century Co. v. Quilling,* 136 Wis. 481, 487, 117 N. W. 1007. Now how does that apply to the facts here?

Appellant, as it must be observed, held the stock to all intents and purposes as owner. No one could sell it without his permission. The company, through Bates, necessarily assumed to have such permission and appellant acquiesced in all it did, from first to last, though not having given any express authority. Let it be conceded, that Bates acted for the company in a measure, yet it is undisputed that he also acted for respondent, actually or by assumption of authority and, certainly, in his interest. What difference does it make that the company received the money and then paid it to appellant? That is commonly the case where a person, pretending to be the agent, or to act in the interest of another, without disclosing his representative capacity, receives the

consideration from a third party and turns it over to such other who may be entirely ignorant of the matter until tender of such consideration. The receipt of it relates back to the assumption of authority and gives original validity to it, only waiting upon refusal to disaffirm and restore the former situation in case of the contract having been fraudulently made, upon being fully informed of the facts in that regard.

The whole transaction here, even if, ostensibly, for the company, was, evidently, chiefly for appellant. Certainly it, through Bates, acted for him in enabling him to realize on his collateral. It was not specially benefited by the transaction for it only exchanged a liability on the note held by appellant for one on the stock. Appellant was the only one really enriched in such transaction. He was favored to the impoverishment of respondent by just so much as the latter paid and which eventually reached the pocket of appellant. Why do not Bates, the company, and appellant stand on the same platform as the trial court held?

The court says, substantially, that Bates was not the agent of *Foster* either by appointment or ratification. There was no agency because *Foster* never appointed any agent in the matter. He could not be bound by what he had no knowledge of. That seems to have been said without appreciating the elementary principles before stated. Agency by ratification of an unauthorized act, by keeping the fruits thereof after knowing of the facts, is about as well known as anything in the law of agency. Why say there was no agency because no appointment nor ratification? Was it overlooked that if a person, after being informed of the facts as to another having perpetrated a fraud in his interest upon a third person, retains the fruits thereof, he thereby ratifies the act of such other and becomes liable for the wrong though entirely innocent of any original sin?

McDermott v. Jackson, 97 Wis. 64, 72 N. W. 375, covers the whole subject involved here. It followed *Morse v. Ryan*,

26 Wis. 356, 361, where the court substantially said: If a person accepts the benefit of a contract made by one professing to have authority to act for him, he thereby ratifies the means by which it was obtained and such ratification is equivalent to previous authorization. He cannot object to evidence of fraudulent representations made in procuring the same, on the ground that the actor was not his agent, or that the representations were not authorized. That was followed in *Burke v. M., L. S. & W. R. Co.* 83 Wis. 410, 415, 53 N. W. 692, and again in *Garlick v. Morley,* 147 Wis. 397, 399, 132 N. W. 601, where it was said: "Ratification may appear circumstantially as well as expressly. It may be presumed by conduct such as by carrying out the contract and accepting the benefits in like manner as if the person assuming to be authorized to represent him had authority in fact."

Thus, it will be seen, that this court has over and over again proclaimed and applied the principle which the trial court supposed ruled this case. Why was it wrong? The opinion of the court is silent on that. It does not refer to the stated principle or any principle or any authority which at all fits the case, so far as I can see. It is said there was no agency because no original authorization or subsequent ratification, quite ignoring, seemingly, the existence of the facts so often held sufficient to work ratification in law with all the consequences of original authority.

The following opinion was filed April 18, 1914:

WINSLOW, C. J. (*concurring*). The principle that one cannot, with knowledge of the facts, retain the avails of an unauthorized contract made for him by another assuming to act as his agent and repudiate the responsibilities of the contract, is so well understood that it needs no restatement. This constitutes agency by ratification, and it is just as effective to charge the principal with responsibility for the acts of

the agent in the transaction as original authority. *McDermott v. Jackson,* 97 Wis. 64, 72 N. W. 375; *Twentieth Century Co. v. Quilling,* 136 Wis. 481, 117 N. W. 1007. I do not understand that there is any intention to depart from that principle in the decision of the present case. The trial court came to the conclusion that Bates assumed to act for *Foster* in the sale of the stock, and that when *Foster,* with knowledge of Bates's alleged fraud, retained the $1,000 which the Bates-Odenbrett Company afterwards sent him, he ratified the entire transaction and became liable for the fraud perpetrated by Bates in selling the stock to *Tripp.* If the trial court's premise be right the conclusion must also be right, but I understand that the decision of the court in this case is based on the proposition that the premise is not right, *i. e.* Bates was not in fact acting for *Foster,* nor did he assume to be so acting. If it were to be held that *Foster* is liable for Bates's misrepresentations in the present case, we think it would be a serious shock to the commercial world and tend to unsettle a very well recognized business custom. Such a holding would mean that whenever a creditor takes collateral security from a debtor and consents that the debtor may dispose of the collateral and apply the proceeds on the debt, the creditor, though taking no part in the transaction and really indifferent as to its success, may be compelled to return the consideration or respond in damages for his debtor's fraud. Probably there is and always will be a very large amount of collateral held under just such arrangements. It cannot be justly said in such a case that in making sale of the collateral the debtor or his agent is acting for the creditor. Under ordinary circumstances the creditor is indifferent in the matter; he holds the property as bailee for a particular purpose. He is not interested in its sale, but simply in the payment of the debt. If the debtor can obtain the money to make the payment by selling the collateral he is willing to take the money; if the debtor can obtain the money

to pay the debt in other ways, the creditor is equally willing to take it. Of course, the creditor may himself take an active part in the sale of the collateral, and in this case a different proposition would arise; but where, as in the present case, the creditor simply holds the collateral as security, taking no part whatever in the sale thereof, except to transfer it when requested and to receive from his debtor payment of the debt, we think it cannot be justly or fairly said that the person making the sale has assumed to act or has in fact acted as the creditor's agent in the transaction. So understood, this decision does not in any way discredit the well established legal results of the ratification of an unauthorized contract by retention of the avails thereof.

BARNES, J. I concur in the foregoing.

VINJE, J. I concur in the foregoing opinion of Chief Justice WINSLOW.

JANIAK, Respondent, vs. MILWAUKEE WESTERN FUEL COMPANY, Appellant.

March 17—April 9, 1914.

Master and servant: Injury from set-screw on shaft: Contributory negligence: Assumption of risk: Evidence: Competency: Excessive damages.

1. Plaintiff, an oiler, while filling a grease cup was injured by being caught by a projecting set-screw on a revolving shaft. Upon evidence tending to show, among other things, that he could have performed his duty while standing in a safe place in a passageway, but that a team in the passageway interfered therewith, and that it was customary under such circumstances, to defendant's knowledge, to do the work from the place where plaintiff stood at the time of the injury, it is *held* that in standing where he did he was not guilty of contributory negligence as a matter of law.

2. The defense of assumption of risk in such a case has been abolished by sec. 1636*jj*, Stats.; and even though there was such assumption by plaintiff he was not necessarily guilty of contributory negligence.
3. Evidence that former employees of defendant had stood where plaintiff did in oiling, even though as to one of them such evidence related to a time more than a year and a half prior to the accident—which happened after plaintiff had been employed as an oiler about fourteen months,—was competent to show that the set-screw was so located as to be dangerous to employees in the discharge of their ordinary duties, as well as upon the issue of where employees, to the knowledge of defendant, ordinarily stood when oiling.
4. An award of $8,000 for serious and painful injuries to a man about twenty-six years old, including fractures of his right leg both above and below the knee which resulted in a shortening and bending of the leg and permanent impairment of its use, and an injury to the scrotum and its contents, is *held* not excessive.

APPEAL from a judgment of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Affirmed.*

Action for personal injuries sustained October 25, 1911. Defendant was engaged in the coal business, and in order to facilitate the loading of coal it was elevated by means of conveyors into bins or hoppers supported by heavy upright timbers. Adjacent to where plaintiff was hurt was a passageway for teams used in loading coal into wagons which were driven close to the upright timbers supporting the elevated bins. Just inside one of such upright timbers, and running at right angles to the passageway, was a revolving shaft about thirty inches above ground, one end of which rested on a horizontal timber placed parallel with the passageway just inside the upright ones and had an oil box on top of it. A little to the east of the oil box was a grease cup. The passageway ran east and west and the revolving shaft north and south. A short distance south of the horizontal timber and near the ground was a conveyor running east and west. On the day of the accident plaintiff, for the purpose

of filling the oil box and grease cup, stepped south over the horizontal timber just west of the revolving shaft and stood facing the shaft, in a small space bounded on the north by the horizontal timber, on the south by the conveyor, on the west by a timber supporting the conveyor and extending north nearly to the horizontal timber, and on the east or in front of him there was the revolving shaft, which, a few inches south of the grease box, had a set-screw projecting nearly an inch from the collar. The shaft revolved twenty times per minute. The upright timber, opposite the center of which was located the grease box, was about fourteen inches in diameter. As plaintiff was reaching for the grease cup his clothing was caught by the revolving set-screw and he was injured. The place where plaintiff stood was called point 12 in the special verdict.

The jury found (1) that the shaft was so located as to be dangerous to any employee of the defendant who was in the discharge of his duty; (2) that Kleppe instructed the plaintiff to screw down the grease cup while standing at point 12, as shown on plaintiff's exhibit 6; (3) that the plaintiff was accustomed to stand at point 12 as shown on plaintiff's exhibit 6 when screwing down the grease cup; (4) that the employees of the defendant who had the control and direction of the plaintiff in the performance of his duties knew that the plaintiff was accustomed to screw down the grease cup while standing at point 12, as shown on plaintiff's exhibit 6; (5) that the defendant ought reasonably to have anticipated that the plaintiff would, in attempting to turn down the grease cup west of the hard-coal elevator, stand at the point marked 12 in plaintiff's exhibit 6; (6) that no want of ordinary care on the part of the plaintiff proximately contributed to his injury; and (7) damages $8,000.

From a judgment for plaintiff entered upon the verdict the defendant appealed.

For the appellant there was a brief by *Doe & Ballhorn,* and oral argument by *J. B. Doe* and *H. M. Wilke.*

For the respondent there was a brief by *John C. Kleczka* and *Glicksman, Gold & Corrigan,* and oral argument by *Mr. Kleczka* and *Mr. W. L. Gold.*

VINJE, J. The chief contention of the defendant is that plaintiff was guilty of contributory negligence as a matter of law in stepping south of the horizontal timber to clean out and fill the oil box and attend to the grease cup, as in doing so he placed himself in close proximity to the revolving shaft. It is claimed that he could have stood in a perfectly safe place by remaining in the passageway and cleaning out the oil box by reaching partly around the upright timber. That the box as well as the grease cup could have been safely attended to by standing in the passageway is unquestionably true. But that was not always the customary place used in oiling and apparently for two reasons: first, because teams were often in the passageway, preventing that place from being used; and second, in cleaning out and attending to the oil box from that position it was necessary to reach in around the upright timber. A person standing in the place plaintiff did, directly faced the oil box and was in a better position to see and attend to his work, though not in such a safe place. The grease cup and oil box required oiling twice a day and it was plaintiff's duty to attend to them. At the time he was injured there was a team in the passageway, so he stepped over the horizontal timber to do his work. He says he was careful to keep away from the shaft, and that he did not know of the set-screw. He also says there was more or less coal dust in the air where he stood. The evidence shows that it was customary to oil from where plaintiff stood when teams were interfering with doing it from the passageway, and had been for several years past, and that such custom

was known to the defendant. In view of this we cannot say that it was negligence as a matter of law for plaintiff to stand where he did. While the place, so far as his feet were concerned, was rather a confined one, he had a secure footing; his arms and body were free, and there is nothing to indicate that the injury was in any manner caused by the fact that plaintiff was more or less surrounded by timbers where he stood. The conveyor to the south was guarded, and does not appear in any way to have contributed to the injury. Had plaintiff's place been entirely free from surrounding objects except the revolving shaft he would have been compelled to approach it as closely as he did in order to reach the grease cup. We cannot say that it was contributory negligence as a matter of law to stand where he did, and the jury were justified upon the evidence to find that he was guilty of none.

He undoubtedly assumed the risk of the dangers that by the exercise of ordinary care were open and visible to him where he stood, including the revolving shaft. But the defense of assumption of risk is abolished by the statute. Sec. 1636*jj*, Stats. So the only defense left on this branch of the case was contributory negligence. That there may be an assumption of risk and absence of contributory negligence is well settled by our decisions. *Murray v. Paine L. Co.* 155 Wis. 409, 144 N. W. 982, and cases cited.

Exception is taken to the admission of evidence that former employees of defendant stood where plaintiff did in oiling, and particularly to the testimony of one Risch, who said he stood there when oiling in and prior to March, 1910. Plaintiff had been employed as oiler for about fourteen months, so it was necessary to go back some considerable time to ascertain what was done before he began his duties. We think the evidence objected to was competent to show that the set-screw was so located as to be dangerous to employees in the discharge of their ordinary duties, as well as upon the issue of where employees, to the knowledge of defendant, ordinarily stood when oiling.

The jury assessed the plaintiff's damages at $8,000, and this is claimed to be excessive. At the time of his injury plaintiff was twenty-five and a half years of age and earning $2 per day of ten hours each. His right leg was broken both above and below the knee, the last one a compound fracture; and the scrotum and contents were injured. He was at the hospital for over nine months and there underwent four operations. He suffered severe pain, is still suffering, and has to have medical attendance. He has been unable to work. A perfect union of the broken bones above the knee was not obtained, resulting in a shortening of three inches of the right leg and a bending outward of the thigh and leg. An extensive infection developed which still exists. The use of the leg is permanently impaired, and another operation, with uncertain results, is advised. Considering the serious nature of the injury as here briefly outlined, we cannot say that $8,000 is excessive. *Monaghan v. Northwestern F. Co.* 140 Wis. 457, 122 N. W. 1066; *Scieczinski v. Filer & Stowell Co.* 147 Wis. 533, 539, 133 N. W. 641; *Koepp v. Nat. E. & S. Co.* 151 Wis. 302, 139 N. W. 179.

By the Court.—Judgment affirmed.

State ex rel. Thomas Furnace Company vs. City of Milwaukee.

February 28—April 9, 1914.

Constitutional law: Commerce: Federal and state control: Harbor improvements: Approval of plans: Navigable waters: Title and interests in river bed: Effect of conveyance to United States: Eminent domain: Changes in water channel: Procedure: Milwaukee city charter: Statutes construed.

1. Under the commerce clause of the federal constitution the United States has a certain control over navigation and its incidents, including improvements of navigable rivers and bridges spanning the same. This is paramount to but not ex-

clusive of state control of the subject, which is much broader and extends to many regulations with which the federal government does not concern itself.

2. Where money is appropriated by Congress for the improvement of a harbor, subject to the condition that the plans therefor shall be approved by the federal government, the form and manner of approval are matters for the administrative department of that government.

3. The mere fact that land sought to be condemned by a city for the improvement of its river harbor was to be conveyed to the United States as a condition of receiving a federal appropriation, did not affect the right of the city to take the property. The city would acquire only an easement, and a conveyance by it, even though expressly authorized by the state legislature, would not confer proprietary rights upon the United States nor in any way impair the authority of the city or the state over the new river bed.

4. In the original river bed there were three interests: (1) that of the riparian proprietor, who held a qualified title; (2) paramount to this the public interest represented by the state, for the purposes of navigation or improvement; and (3) paramount to these two the governmental or sovereign interest of the United States which it might exert in aid of navigation or other incident of interstate commerce; and the enlarged bed created by condemnation proceedings has the same legal status as the former river bottom.

5. *It would seem* that the provision in sec. 30, ch. VI, of the Milwaukee city charter giving the common council power to change the location of any water channel or slip and the location and direction of any river, in view of the connection in which it is found and the reference in the same section to ch. 129, Laws of 1873, relates to the Kinnickinnic river so far as made a public river under said ch. 129, and not otherwise.

6. In a proceeding to take land for the improvement of the Kinnickinnic river, it appearing that dock lines had been previously established at the place in question under sec. 20, ch. 129, Laws of 1873, or at least that there had been an attempt at compliance with that act,—it follows that the city has power under its charter to take land for the widening of the channel of that river.

7. Where the particular improvement contemplated is such an one as is provided for in secs. 926—108 to 926—113, Stats., those sections must be complied with, and, because they relate to the particular subject, must have controlling force and effect.

8. The words of sec. 926—108, "a complete system of waterways, canals, slips, revetments, docks and bridges intended to be

constructed or improved," were not intended to leave the question of the completeness of the system to the determination of a court or jury, but they mean a system completely outlined so far as intended to be constructed and so far as agreed upon between the city and the federal government.

9. Such a complete system was settled upon and determined when the representatives of the federal government approved the plans for the improvement of the Kinnickinnic river proposed by the city officials.

10. The requirements of sec. 926—110, that the plan when approved shall be filed in the office of the board of public works and a duplicate recorded with the register of deeds, and that the common council shall thereupon promptly and permanently locate by ordinance all dock lines and revetments in conformity thereto, are substantial, not merely directory; and the riparian owners have the right to insist that the commands of the statute in this respect be followed.

11. The changes referred to in sec. 926—110, required to meet the approval of the federal government, are to be made before the establishment of the permanent dock lines.

12. After the permanent dock lines are once established with the approval of the federal government, the city is impliedly prohibited from changing them, and the taking of land inside of such dock lines is contrary to the purposes of the act and unauthorized.

13. The reference in the act of Congress of June 25, 1910, to House Document No. 667, which was accompanied by a map on which were indicated in red certain localities "where dredging is to be done," which points were inside the then established dock lines, did not have the effect to change such dock lines or to confer on the city the power to take the lands for that purpose.

14. The city acquires its power of eminent domain by delegation from the state, not from the United States.

15. Where the petition for condemnation shows that the power of eminent domain is invoked under and pursuant to secs. 926—108 to 926—113, Stats., for the purpose and in aid of the project there mentioned, the map and survey accompanying the same should correspond on its land side with the permanent dock line established in the manner therein provided, otherwise the proceeding will be void.

16. Whatever general power of condemnation the city of Milwaukee may have under its charter is restrained in its exercise, limited, and qualified by secs. 926—108 *et seq.*, when it is exercised in the particular case there mentioned.

CERTIORARI brought under sec. 926*q*, Stats., to review a judgment of the circuit court for Milwaukee county condemning land for public use: W. J. TURNER, Circuit Judge. *Reversed.*

For the relator there was a brief by *Lewis M. Ogden,* attorney, and *Frank M. Hoyt,* counsel, and oral argument by *Mr. Ogden* and *Mr. Louis J. Brabant.*

For the respondent there was a brief by *Daniel W. Hoan,* city attorney, and *Mark A. Kline,* assistant city attorney, and oral argument by *Mr. Kline.*

TIMLIN, J. This case can best be considered by taking it up at first from three several viewpoints; that is to say, from the viewpoint of the United States government, its relations to the subject under consideration and the requirements of its laws and regulations; second, the same as to the state; third, the same as to the city of *Milwaukee.*

Under the commerce clause of the United States constitution the federal government has a certain control over navigation and its incidents, including improvements of navigable rivers and bridges spanning the same. This is paramount to but not exclusive of state control of the subject, which is much broader and extends to a great many regulations with which the federal government does not concern itself at all. For illustration: The state acting directly or through a municipal corporation fixes dock lines or builds a bridge, but not so as to obstruct or impair navigation. The United States controls its own purse also and can make such condition upon its donations as it pleases. In the instant case the United States appropriated money to improve or aid in the improvement of the Milwaukee harbor. This donation was upon two conditions: first, the federal government should approve the plan; second, that lands acquired by the city for the purpose should be transferred to the United States. The approval of the plan, in the nature of things, should precede the acquisi-

tion of the land by the city, and for good reason the conveyance to the United States should follow the acquisition of the land. The United States did approve quite a comprehensive plan. This was not so comprehensive apparently as the original plans, and the approval is criticised. But it is sufficient. The form and manner of approval is a matter for the administrative department of the United States government. The dock line so approved was established by ordinance. The subsequent proceedings in Congress and by the War Department contain nothing definitely altering or changing the dock line so approved.

This disposes of the questions relating to the United States except the claim that the city could not condemn the property for the purpose of turning it over to the United States. This is stating the matter too strongly, and it assumes that this was the purpose of condemnation when it was only an incident. When the city, acting under a delegated power of eminent domain, condemns property for public use, such as a street, the city thereby acquires no proprietary interest therein. After condemnation the city would have no more interest in this enlarged river bed than it had before condemnation in the former river bed. Neither had the United States any proprietary interest in the former river bed. It had limited rights there as a sovereign but not as a proprietor. By the deed to the United States its rights were in no degree enlarged. Sovereign authority is not conveyed or acquired by deed. So that as far as the United States and the city were concerned the requirement of a deed was quite a formal, harmless, and ineffectual ceremony, insisted upon by the War Department probably from excess of caution, but in no degree changing the relation of the parties to the new river bed. Prior to the making of the new bed there were three interests in the ancient river bed; first, that of the riparian proprietor, who held a qualified title. Paramount to this the public interest represented by the state, for the purposes of navigation

or improvement. This was a governmental or sovereign interest and not a proprietary interest. Paramount to these two was the governmental or sovereign interest of the United States which it might exert in aid of navigation or other incident of interstate commerce. After the condemnation the easement acquired thereby reduced this new river bed to the same legal status as the former river bottom. Only an easement is acquired. Sec. 28, ch. VI, Charter. I think it cannot affect this that the legislature of the state by sec. 926—113, Stats., authorized the city to donate or transfer the title to the land taken or acquired to the government of the United States for the purpose of complying with the condition imposed by the United States upon the disbursement of its money in aid of the project. The city, notwithstanding this proposed conveyance, would be still condemning for public use and the public use would be in no wise impaired, the authority of the city or state such as it is fixed by law in no wise impaired by the grant, because neither the city nor the state would acquire by the condemnation any other right therein than the right to devote the property to the same public use, regulated by the same laws to the same extent as before. It is as if the city by the authority of the legislature of the state should convey to the United States by deed a public highway. This conveyance would not make the highway any less a public use, would carry no proprietary interest therein, because the city and the state had none except as trustee for the public, and would not diminish the city or state authority over it, for, as said before, that is not to be conveyed by deed.

Trombley v. Humphrey, 23 Mich. 471, 483, approved in *Kohl v. U. S.* 91 U. S. 367, is readily distinguishable. There the United States refused the site, and the city had no authority to condemn for that kind of a public use in which neither the state nor the city represented the public but a use solely and exclusively under the regulation of the fed-

eral government, which rejected the proposed site. This case is rather controlled by the principle of *Lancey v. King Co.* 15 Wash. 9, 45 Pac. 645, 34 L. R. A. 817. See, also, 1 Lewis, Em. Dom. (3d ed.) § 309 and cases cited.

2. The next question is, Was there any jurisdictional error in the proceeding, having regard to state statutes? Secs. 926*l* to 926*s* prescribe a convenient mode of procedure which was followed, but do not purport to confer the power of eminent domain on the city. The petition must show a public purpose permitted by the charter of such city or by some law of this state applying to such city. Sec. 926*m*. One law of this state applying is found in secs. 926—108 to 926—113; another in the city charter of *Milwaukee*. Sec. 19 of ch. VI of the charter reads:

"Whenever any . . . river, canal or waterway shall be laid out, widened or enlarged, under the provisions of this chapter, the board of public works shall cause an accurate survey, plat and profile thereof to be made."

A somewhat similar provision is found in sec. 926*m*, Stats. 1913, and the city attorney for some reason claims to have proceeded under the latter.

This was done, but differed from the dock line approved by the United States. Sec. 21 provides that the directions given in this chapter shall be deemed only directory, and no irregularity or informality in any of the proceedings under the chapter shall affect the validity of the proceedings. Sec. 28 of ch. VI provides that as a result of the condemnation the city shall thereupon and *thereby acquire and have the right to the use of such lands for such purpose forever, which is not the acquisition of a fee simple.* Sec. 30, ch. VI, seems to limit the taking of property for opening and constructing the water channel of the Kinnickinnic river. It is provided:

"In case it shall be necessary to take any property for the purpose of opening . . . and constructing the water channel

of the Kinnickinnic river, when the same shall be adopted and established, recorded and filed, as provided by section 20 of chapter 129 of the Laws of 1873, the same proceedings shall be had as are in this chapter prescribed for the taking of property for public squares, grounds, streets and alleys; the common council shall have power to vacate any canal or slip or any part thereof for the same reasons and upon the same proceedings being had that are prescribed in this chapter for vacating streets in said city, and the said common council is hereby authorized and empowered to change the location and direction of any canal, water channel or slip and the location and direction of any river within the corporate limits of said city, upon the same proceedings had as are prescribed in this chapter for changing the location or direction of any street in said city," etc.

It is a close question whether the part of this sec. 30 following the semicolon in the above quotation is independent of that provision relating to the channel of the Kinnickinnic river preceding that semicolon. If it is, there is a clear authority given to "change the location of *any* water channel or slip and the location and direction of any river within the corporate limits of said city."

Ch. 129, Laws of 1873, was an act to consolidate and amend the act to incorporate the city of *Milwaukee* approved February 20, 1852. Sec. 20 of that act declared that the channel of the Kinnickinnic river should not exceed 200 feet in width, and provided for a survey and plat of the river, establishing and re-establishing the dock lines thereof so as not to exceed 200 feet in width from its mouth to the south line of the said city. It prescribed what this survey and plat should contain, that it must be approved by the common council, that the effect of the approval, survey, and filing of the plat would be to vest in the city all lands covered by the said water channel of the river so established as if the plat had been made, acknowledged, and recorded by the owners thereof, provided, however, that no lands belonging to private persons and not dedicated or conveyed by such owners should

be taken until compensation should be ascertained and paid. It is then provided that the said water channel, when so adopted and established by the common council, would be a public river, subject to all laws and regulations applicable to it as such. This would seem to indicate that the part of the quoted section above following the semicolon mentioned related to the Kinnickinnic river *as so made a public river,* but not otherwise.

We now come to the inquiry, What is the effect of the failure on the part of the city to prove that this step was taken? Sec. 1 of ch. IX of the charter provides that the harbor of Milwaukee shall include the Milwaukee river from Lake Michigan to the dam and all those portions of the Kinnickinnic river and of the Menomonee river, etc., which are in the limits of the city of *Milwaukee.* Sec. 2 of ch. IX provides that whenever the survey and plat of the Kinnickinnic river describing the channel and dock lines of said river shall be made, adopted, established, recorded, and filed as provided by sec. 20, ch. 129, Laws of 1873, the water channel of said river as described and represented by such survey and plat shall be deemed to be and is hereby declared to be a public navigable river. Sec. 3 of ch. IX provides for the establishment of dock lines and wharf lines on the banks of these three rivers. See ch. 184, Laws of 1874.

Plaintiff's Exhibit 23 tends to show that dock lines existed on the Kinnickinnic river prior to the establishment of the present dock line. Reinertsen's map, offered in evidence by the relator, shows original established dock line and original center of river, also the new established dock line. It shows three dock lines. The communication of the city engineer, following the plat for the opening, widening, and extending of Kinnickinnic river, speaks of the new established dock line of the Kinnickinnic river and the old established dock line. This is evidence that there was a dock line established on the Kinnickinnic river prior to 1906, and consequently

evidence tending to show that sec. 20, ch. 129, Laws of 1873, had been complied with, or at least that there was an attempt at compliance with that law; consequently that the power of eminent domain as delegated to the city by the sections above referred to included the widening of the channel of the Kinnickinnic river.

We find no cause for reversal upon any of the foregoing grounds. But when we come to the state statutes referring specifically to this improvement and grouped as secs. 926—108 to 926—113 a difficulty arises. These statutes should be also complied with, and because they relate to this particular subject or this particular improvement have controlling force and effect. The project having finally settled down to the improvement of the Kinnickinnic river designated on the plat "Exhibit A," approved by the War Department of the United States, the statutes last referred to take up the matter at this point. The words of sec. 926—108, "a complete system of waterways, canals, slips, revetments, docks and bridges intended to be constructed or improved," are not intended to leave the question of the completeness of the system to the determination of a court or jury. These words are not well chosen, for who can say that any system is complete unless he have a standard of measurement or comparison? The quoted words must mean a system completely outlined so far as intended to be constructed and so far as agreed upon between the city and the War Department of the United States, or, in other words, the United States government. This complete system was settled upon and determined when the representatives of the United States government approved the plan Exhibit A proposed by the city officials. Sec. 926—110 recognizes this, because the plan proposed by the city is to be open to changes and modifications as circumstances may require in order to meet the approval of the United States government. Having been settled upon in this way, the plan so approved is to be filed in

the office of the board of public works and a duplicate recorded with the register of deeds of the county. Thereupon it becomes the imperative duty of the common council to promptly and permanently locate by ordinance all dock lines and revetments in conformity thereto. The state legislature therefore considered this plan so approved as a thing of great importance and reasonable permanence, and directing dock lines to be established in conformity thereto in effect forbade the establishment of dock lines conflicting therewith. These dock lines marked the boundary between the private property of riparian owners and the public easement to be acquired by condemnation. Their location materially affected the value of riparian property and must in many cases have had an important bearing on the amount of damages to be awarded for the taking of land on the river side of these dock lines so established. Consequently the provisions mentioned are substantial, not merely directory, and the riparian owners have the right to insist that the commands of the statute in this respect be followed.

The purposes contemplated by the act (secs. 926—108 to 926—113) are very apparent. Reasonably permanent dock lines having the approval of the United States government and intended to mark the boundary between private riparian lands and lands subject to the public easement must, according to the apparent purposes of the act in question, have also marked the boundary of the land to be taken by condemnation. The statute (sec. 926—113) reads: "Any land needed for any of the purposes contemplated by this act may be taken or acquired . . . by condemnation as in other cases." Land inside these permanent dock lines is not land needed for the purposes of this act, but is rather land taken contrary to the purposes of that act, because it disregards the established dock line, establishes an irregular dock line, and follows no official or authentic dock line of any permanence whatever, and is therefore taken contrary to the purposes of

the act in question, besides causing serious damage and inconvenience to the riparian owner not contemplated by the statute.

The changes contemplated by this act and to be approved by the United States government are to be made before the establishment of the permanent dock line. No doubt the legislature could change or authorize a change in this permanent dock line, but the city is impliedly prohibited from so doing. To take land on the land side of such permanent dock line is to change the dock line if such land so taken is to be used for purposes of navigation; or it is to take private property for no public use if the land taken is not to be used for the purposes of navigation. It must be constantly kept in mind that the city acquires its power of eminent domain by delegation from the state, not from the United States. It seems to have been thought that after the establishment of the dock line in 1906 pursuant to the state statutes above referred to the United States authorized a departure therefrom by reference in the act of Congress of June 25, 1910, to House Document No. 667, which document was accompanied by a map of the city and contained the following: "The localities where dredging is proposed to be done are indicated in red on the accompanying map." The act of Congress referred to is entitled: "An act making appropriations for the construction, repair and preservation of certain public works on rivers and harbors, and for other purposes." But this did not purport to authorize such departure and could not authorize it. No lines or boundaries are given. There is a small blotch of red at or about the place in question apparently somewhat triangular in outline with no measurements or other means of identification. The most that could be claimed for this is that which it purports to be, viz. a designation of the locality where dredging is proposed to be done by the city and that this locality is satisfactory so far as the federal government is concerned. This can have no effect

to extend the power of the city or to alter existing dock lines or to say what shall be condemned, but merely serves to designate the locality where dredging shall be done; presumably shall be done according to established law.

Claiming to proceed under sec. 926*m*, Stats. 1913, the common council directed and the city engineer made a survey and plat of the land proposed to be taken in the instant case. Either by error in surveying or in the belief that the reference in House Document No. 667, *supra*, had power to suspend the statutes of this state, this survey and plat described part of the relator's land and intruded about eight feet inside the permanent dock line near the southerly end thereof and about twenty-five feet further into the river than the permanent dock line at its northerly end, thus taking from it at one end more land than authorized by secs. 926—108 *et seq.* and depriving it of the advantage of this permanent dock line at the other. All the relator's land is improved with extensive improvements. The learned counsel for the city now seeks to uphold the proceeding, claiming that aside from secs. 926—108 *et seq.* the city had power under its charter to widen the channel of this river, and that the proceeding may be supported partly under this power and partly under secs. 926—108 *et seq.* It is true that the city has by its charter power to condemn land for the purpose of widening the channel of a river, but the petition for condemnation shows that the power of eminent domain was invoked in this case under and pursuant to secs. 926—108 *et seq.* for the purpose of and in aid of the project there mentioned. It is also apparent that whatever general power of condemnation the city had under its charter is restrained in its exercise, limited, and qualified by the provisions of secs. 926—108 *et seq.* when it is exercised in the particular case there mentioned. So that the city gains nothing by pointing to two or more original and general grants of power. In the instant case we have the city proceeding in disregard of the

statutes last cited, and it matters not how broad its general grant of power if it is being exercised in the particular case contrary to the statutes governing that case. We are not, however, to be understood as saying that the city could justify its proceedings under several different statutes when there exists a statute containing provisions specific and particular and relating to the subject of condemnation in the case before the court. We express no opinion on that. But it seems quite certain that provisions relating to the exercise of power in the case in hand modify and qualify all general grants of power so far as they can be invoked to support such case in hand. The map and survey preliminary to condemnation provided for in sec. 926*m* should, in a proceeding under secs. 926—108 *et seq.*, have been made to correspond on its land side with the permanent dock line there mentioned. Otherwise the imperative provisions of secs. 926—108 *et seq.* may be disregarded at pleasure. The result of such disregard is shown in *Kneeland v. Milwaukee,* 18 Wis. 411; *Myrick v. La Crosse,* 17 Wis. 442; *Bohlman v. G. B. & M. R. Co.* 40 Wis. 157; *Milwaukee L., H. & T. Co. v. Burlington E. L. & P. Co.* 142 Wis. 436, 125 N. W. 932; *Lexington P. Works v. Canton,* 167 Mass. 341, 45 N. E. 746; 2 Lewis, Em. Dom. (3d ed.) §§ 505, 506, and cases cited.

It follows that the judgment must be reversed, with directions to dismiss the proceeding.

By the Court.—It is so ordered.

BOTOROWICZ, by guardian *ad litem,* Respondent, vs. KIECKHEFER BOX COMPANY, Appellant.

March 17—April 9, 1914.

Master and servant: Unguarded machinery: Duty to put guard in place: Practicability for work in question: Questions for jury: Unwarranted finding of negligence.

1. **In an action for injuries sustained by an employee while making samples upon a creasing machine in a paper-box factory,**

a finding by the jury to the effect that it was not the plaintiff's duty, but that of some other employee, to place upon the machine the guard which defendant had provided but which was not in place at the time of the accident, is *held* not to be contrary to such an overwhelming weight of evidence as would justify this court in setting it aside.

2. But the evidence that it was not reasonably practicable to use the machine for making samples with the guard upon it, is *held* to be of such weight and so reinforced by the physical facts and the reasonable probabilities and inferences that it is overwhelming; and a finding of the jury to the effect that defendant was negligent in requiring the plaintiff to use the machine for that purpose without a guard was unwarranted and should be set aside.

APPEAL from a judgment of the circuit court for Milwaukee county: F. C. ESCHWEILER, Circuit Judge. *Reversed.*

Action for personal injuries. The plaintiff, a young man nineteen years of age, was employed in the defendant's box factory for about a year before the accident in question, and for some months had acted as an assistant to the foreman in the paper-box department, his duties being setting the dies in certain so-called creasing machines, making samples, getting the machines ready for the girls, and showing them how to operate them. There were three of the creasing machines, all of the same construction. They consisted of iron tables sixty inches in width and three feet from the floor, in front of which the operator stood. At each side of the table is a standard or round post on which a heavy iron frame, extending across and above the table, worked up and down, carrying a steel die about fifty-eight inches long, which when at rest stood about three inches above the table and when brought down fitted into a female die in the bed of the table, making a crease in the cardboard or paper on the table. The power by which the die was operated was obtained from the shafting by means of a belt at the right side of the machine, and the belt became operative by pressing of the foot of the operator upon a stepper or treadle which extended out in front of the machine near the floor, and which brought into operation an

eccentric cam. It is not contended that there was any defect in this operation, or that the machine made or could make an unexpected movement of the die. Two or three weeks before the accident in question the defendant had provided guards for these machines, consisting in each case of a piece of strap iron, three eighths of an inch thick, two and one-half inches wide, and fifty-eight inches in length, which could be fastened to the back part of the table by a bolt at each end, and which when so fastened was immediately in front of and about a quarter of an inch distant from the upper die when brought down, and about five eighths of an inch above the table; in other words, it was between the operator and the die. None of the witnesses had ever seen guards on this kind of a machine before, and the manufacturers of the machines had never provided any.

At the time of the accident the plaintiff was operating one of the machines in making samples for a new job. In making samples pencil marks have to be made upon the cardboard to be creased and the die brought carefully down upon the pencil marks, and hence it is necessary that the operator should be able to see the pencil marks when he is operating the machine. This is not necessary when the samples have been made and a gauge provided which automatically regulates the position of the cardboard. There is very strong evidence to the effect that samples, such as the plaintiff was making when hurt, cannot be made when the guard is on the machine, because it is impossible for the operator to see the pencil marks. This, however, was denied by the plaintiff and one or two other witnesses on the trial. In any event the guard was not on the machine, but was lying near by, as the plaintiff knew. He claims that he never put on or took off a guard on any of the machines, and that it was not his duty, but rather the duty of the machinist, to put the guards on. The guards were on the other two machines which were not being used for making samples. It is admitted that it

was necessary to remove the guard whenever the upper die was to be removed and that it was the plaintiff's duty to set the dies.

Just how the accident in question happened is not clear. Upon the trial the plaintiff claimed that the floor was oily and slippery, that he slipped on the floor, that his foot struck the treadle just as he was setting the paper to make a sample,—"I came up against the treadle and I flew in." It is certain that the die came down and cut off his left arm just below the elbow. About two weeks after the accident he made a written statement as to the accident, as follows:

"I do not know how the accident happened. I know it got dark in front of my eyes and I fell into the machine. I never had that happen before. The machine was in perfect condition. It does not repeat. I had run the machine a couple of times a day for a month before the accident. During that month that I ran that machine it never was out of order and it never repeated. That machine cannot repeat because when you push the pedal down a cam comes over and when you let go of the pedal a spring pulls the cam back in place. I often examined the spring and it always worked all right. Your foot could not slip off the pedal because it was corrugated and the corrugations were not worn because the machine was new. The floor in front of the machine was made of hardwood and was not slippery. There was no oil on it and it had no holes in it. When you make a sample box you cannot have a guard on the machine because you got to make pencil marks on the paper where you want to crease it and if the guard was on you could not see the marks.

"JOE BOTOROWICZ.

"I have read that and it is true."

On the trial he was shown this statement, and testified as follows:

"I read it over before I signed it. I knew what the statement was. I understood it when I read it. I knew what I was doing when I signed my name to it—and when I wrote below it, 'I have read that and it is true.' So far as it states the facts they were the truth."

The following special verdict was returned by the jury:

"(1) Was the floor near the foot treadle and in and about the place occupied by the plaintiff while operating the creaser machine just before the accident negligently maintained in such a greasy and oily condition as to be likely to cause plaintiff to slip in such a way as to be injured when operating said machine? *A.* No.

"(2) If you answer question 1 'Yes,' was such condition of said floor a proximate cause of plaintiff's injury? *A.* ——.

"(3) Did defendant negligently require plaintiff to use the creasing machine without a guard upon it, which would prevent plaintiff getting his fingers under the die? *A.* Yes.

"(4) If you answer question 3 'Yes,' was such failure a proximate cause of plaintiff's injury? *A.* Yes.

"(5) Did defendant negligently fail to provide proper light at the machine in question which would permit plaintiff to have a fair view of the place where he was required to work and of the parts and appliances of said machine? *A.* No.

"(6) If you answer question 5 'Yes,' was such failure a proximate cause of plaintiff's injuries? *A.* ——.

"(7) Was there any want of ordinary care on the part of the plaintiff which proximately contributed to produce his injuries? *A.* No.

"(8) What sum would reasonably compensate plaintiff for his injuries? *A.* Five thousand dollars ($5,000)."

Judgment being rendered for the plaintiff on this verdict, the defendant appeals.

For the appellant there was a brief by *Doe & Ballhorn,* and oral argument by *J. B. Doe.*

For the respondent there was a brief by *Rubin & Zabel,* attorneys, and *Horace B. Walmsley,* of counsel, and oral argument by *Mr. Walmsley.*

WINSLOW, C. J. In this case an employer who has made the most earnest endeavor to meet every statutory requirement as to safety appliances on the machinery used by employees has been found guilty of actionable negligence and adjudged to pay heavy damages. It seems from the evidence

that the guards which had been furnished for these machines were devised in the defendant's own shop for the purpose of safeguarding the employees of that shop, and that prior to this time even the manufacturer of the machines had not thought a guard necessary or practicable. In order to sustain the finding of the jury to the effect that the defendant was negligent in requiring the plaintiff to use the machine without a guard, it must appear (1) that it was the duty of some other employee to put the guard on the machine, and (2) that it was reasonably practicable to use the machine for making samples with the guard upon it. If either of these propositions be not supported by credible evidence the conclusion of the jury falls.

As to the first proposition we have had very serious doubt. What seems to be the clear preponderance of the evidence supports the conclusion that it was within the sphere of the plaintiff's own duties to put the guard on the machine when necessary and take it off when necessary. He admits that it was his function to get the machines ready for new jobs, to change the dies when necessary, and that it was necessary to remove the guard when the upper die was changed. To remove or put on the guard it was only necessary to unfasten or refasten two bolts; it could not have been as difficult a task as the task of removing the die. That it was the plaintiff's duty to put on or take off the guard as occasion demanded was testified to by a number of intelligent and disinterested witnesses, and seems far more consistent with the undisputed facts in the case; nevertheless the plaintiff testified positively that it was not his duty, that he had never done it, and further that his immediate superior, the foreman of the department, told him not to put the guard on. We cannot say this evidence is so overwhelmingly overcome by the evidence to the contrary as to justify us in setting aside the conclusion of the jury on this proposition.

As to the second proposition, however, we have reached a different conclusion. The evidence of the superintendent,

the foreman, and the machinist charged with the care of these machines was unanimous to the effect that it was not practicable to have the guard on the machine when samples were being made with large sheets of cardboard, as was admittedly the fact at the time of the accident. The reason given is very persuasive. The male die is a long, straight, flat piece of steel, with a knifelike edge, exactly in front of the operator and at right angles with the surface of the table. When at rest its lower edge is about three inches above the table. When in operation this die moves straight downward until it fits into the female die on the face of the table. It is necessary in making the samples that the operator should clearly see the edge of the die as it approaches the cardboard, in order that he may adjust the board so that the die will come down exactly on the pencil mark. The guard is exactly between the operator and the die. Its lower edge is only five eighths of an inch above the table and its inner surface is only about a quarter of an inch removed from the male die. Thus the only opportunity for the operator to see the pencil mark on the cardboard is through this space about a quarter of an inch in width by two and one-half inches in depth between the inner surface of the guard and the die, and in order to look through this space the operator must bend forward over the table at the risk of seriously disarranging the cardboard, which (if it be a large sheet, as in the present case) projects beyond the table and is likely to touch the body of the operator as he so bends forward, at the same time using his foot on the treadle. So the physical fact seems to us to demonstrate the truth of the testimony given by the witnesses named.

It is true that two witnesses testified that samples could be made on the machine without removing the guard, but one of them did not specify whether he meant that a large sample could be made with the guard on the machine, and the other stated that when the samples "got too big I went on a larger

machine." It is also true that the plaintiff testified on the trial that it was not necessary to remove the guard when making a sample box such as he was then making, but he admits that two weeks after the accident he stated in writing that "when you make a sample box you cannot have a guard on the machine, because you got to make pencil marks on the paper where you want to crease it, and if the guard was on you could not see the marks." Upon the trial, when shown this statement, he admits that he read and understood the statement and that "so far as it states the facts they were the truth." Not the slightest claim of overreaching or unfairness or lack of comprehension of the contents of the statement is made.

The trial judge in an opinion written upon the various motions made after judgment said that there was "great confusion" and "inconsistencies" in the plaintiff's testimony. This characterization is mild to the point of euphemism. Careful consideration of the whole case convinces us that the great weight of the testimony is against the finding of the jury on this latter proposition, and that weight is so reinforced by the physical facts and the reasonable probabilities and inferences that it is overwhelming. *Bannon v. Ins. Co. of N. A.* 115 Wis. 250, 91 N. W. 666; *Asserin v. Modern B. of A.* 147 Wis. 520, 133 N. W. 579.

By the Court.—Judgment reversed, and action remanded with directions to enter judgment for the defendant notwithstanding the verdict.

WILL OF ROSE: HAHN, Guardian, Appellant, vs. LEAHY, Trustee, Respondent.

March 17—April 9, 1914.

Wills: Construction: Termination of trust: "Time of distribution."

Under a will devising property in trust and, after making certain provisions as to payment of the income to a daughter-in-law (widow of a deceased son) and her two minor children, providing that upon the death or remarriage of said daughter-in-law the trustee should "pay, assign, transfer and set over unto my said two grandchildren the entire fund and estate," it is *held* that the marriage of the daughter-in-law terminated the trust and fixed the time for distribution of the trust estate, and, she having been appointed guardian of the persons and estate of the children, the trustee should turn over the property to her for them.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Reversed.*

Proceedings involving construction of the will of Margaret E. Rose, which so far as needs to be examined is as follows:

"Fourth. All the rest, residue and remainder of my estate and property, of whatsoever name, nature, kind, title or description and wherever situated, I give, devise and bequeath to *William H. Leahy* and to his successor in trust, but in trust only, for the uses and purposes, as follows, to wit:

"(A) In his sound judgment and discretion to sell and convert into cash, any and all of my real estate, bearing in mind, however, the most favorable and advantageous time and opportunity therefor, and the best interests of my estate, and I do hereby for such purpose, empower and authorize said trustee and his successor in trust, to sell and convert my said real estate without first procuring license or permission from any court, and to execute and deliver deeds, instruments of transfer and other writings necessary to pass a proper title thereto to the purchaser or purchasers.

"(B) To invest and keep invested said trust estate during the period of said trust, and collect the income thereof as the same may accrue.

"(C) To pay all necessary expenses of said trust.

"(D) To pay the entire net income of said trust fund to my daughter-in-law, *Phœbe Ruby Blakeley,* until the younger of my said two grandchildren shall have become twenty-one years of age, provided my said daughter-in-law, *Phœbe Ruby Blakeley,* shall not have remarried, said income to be paid to my said daughter-in-law for the purpose of supporting herself, and supporting, educating and caring for my said two grandchildren.

"(E) Upon the arrival of the younger of my said two grandchildren at the age of twenty-one years, to pay two thirds of the net income of my said estate to my said granddaughters in equal shares, at as regular periods as possible; and to pay one third of the net income of my estate to my said daughter-in-law, *Phœbe Ruby Blakeley,* as long as she shall remain the widow of my deceased son.

"(F) Upon the death, or in the event of the remarriage of my said daughter-in-law, *Phœbe Ruby Blakeley,* to pay, assign, transfer and set over unto my said two grandchildren the entire fund and estate in the hands of said trustee in equal shares so that each child shall receive one half thereof, or in the case of the death of either of my two granddaughters leaving issue, to such issue by their right of representation; provided, that if either of my said two granddaughters shall die before the time of distribution without issue, that her share of my estate shall go and belong to her surviving sister; and provided further, that in case of the death of both of my two granddaughters before the time of distribution, and without issue, the entire income of my estate shall go to my daughter-in-law so long as she remains the widow of my deceased son, and after her death or remarriage, the entire property, fund and estate herein devised and bequeathed, shall go and belong to my brothers, Thomas Leahy, James Leahy and *William Leahy,* and to my sister, Mrs. M. E. Sweeney, and to their respective issue by right of representation."

The property willed in trust was duly assigned to the trustee in proceedings to settle the estate, April, 1912. *Phœbe Ruby Blakeley* was a daughter-in-law of the testatrix. She was a widow with two minor children,—Margaret and Harriet,—when the will was executed and until after assign-

ment to the trustee. Thereafter, June 10, 1912, she became the wife of O. C. Hahn. She was duly appointed guardian of her children, one being aged ten and the other eight years. Upon her marriage she demanded the trust property as such guardian. It was refused. Then she commenced proceedings in county court to compel the trustee to settle his account and to comply with such demand. In due course the county court decided that the second marriage terminated the trust, and ordered the trustee to account as to his doings with the trust property, and turn over what remained to the guardian. On appeal to the circuit court that decision was reversed, upon the theory that the trustee was empowered to hold and administer the property until the younger of the two grandchildren reached the age of twenty-one years, unless the trust should be sooner terminated by the death of both grandchildren without issue. Judgment was rendered accordingly.

For the appellant there was a brief by *Churchill, Bennett & Churchill,* and oral argument by *W. H. Churchill.*

For the respondent there was a brief by *Fiedler & Fiedler,* and oral argument by *E. C. Fiedler.*

MARSHALL, J. Did the second marriage terminate the trust and set the point of time for distribution of the trust fund? That is the question to be solved.

As above indicated, the proposition suggested was answered in the affirmative in the county court and in the negative by the circuit court. The plain terms of the will seem to support the answer as given in the county court.

"Upon the death, or in the event of the remarriage of my said daughter-in-law, . . . to pay, assign, transfer and set over unto my said two grandchildren the entire fund and estate . . . so that each shall have one half thereof," etc.

There is nothing ambiguous about that language. It is followed by two references to "the time of distribution." No such time as to the *corpus* of the trust estate is mentioned

or suggested, except by the words "Upon the death, or in the event of remarriage of my said daughter-in-law," etc. Then and not till then but then absolutely, the trust estate was intended to vest in right and enjoyment. That is as the county court looked at the matter. Therefore, the judgment must be reversed, and the cause remanded for judgment affirming that of the county court and remanding the same to such court for execution.

By the Court.—So ordered.

GERMANIA NATIONAL BANK OF MILWAUKEE, Respondent, vs. LACHENMAIER, Appellant.

March 18—April 9, 1914.

Attachment: Intent to defraud creditors: Question of fact: Evidence.

1. Upon traverse of an affidavit for attachment the question of defendant's intent to defraud his creditors is a question of fact.
2. The evidence in this case is *held* to sustain a finding by the trial court to the effect that defendant disposed of certain moneys to his wife with intent to defraud his creditors, and concealed other moneys with like intent.

APPEAL from a judgment of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Affirmed.*

For the appellant there were briefs by *William E. Burke,* attorney, and *David E. Johnson,* of counsel, and oral argument by *Mr. Burke, Mr. Johnson,* and *Mr. J. G. Flanders.*

For the respondent there was a brief by *Austin, Fehr & Gehrz,* and oral argument by *G. G. Gehrz.*

SIEBECKER, J. The plaintiff bank brought action on a note given by the defendant to plaintiff on September 2, 1910, due six months thereafter. On November 19, 1910,

this action was commenced by service of the summons and complaint. On the same day, upon affidavit of the cashier of the bank, the plaintiff commenced attachment proceedings based upon sufficient undertaking and an affidavit stating that the debt, evidenced by the note, is to become due thereafter, and that affiant had good reason to believe and did believe that the defendant was about to abscond from the state of Wisconsin, that he had assigned, conveyed, disposed of, or concealed his property, and that he was about to assign, convey, dispose of, or conceal his property or a part thereof with the intent to defraud his creditors. The sheriff of Milwaukee county under the writ of attachment seized property belonging to the defendant amounting to $1,269.35. The defendant on November 21, 1910, delivered to the sheriff his undertaking in the sum of $3,050 signed by the Illinois Surety Company as surety, conditioned that they will pay on demand the amount of any judgments plaintiff might recover against the defendant in this action and in another action between the same parties wherein attachment proceedings were pending, not to exceed the amount of the undertaking. Upon delivery of this undertaking the sheriff returned the property he held under the levy to the defendant. The defendant interposed a special answer in the attachment proceedings denying the existence of the material facts stated in the affidavit of attachment, and the issues so raised were, under stipulation of the parties, tried by the court. It was stipulated that the material evidence offered in either case was to be considered in each case.

It appears that the defendant for some time prior to the month of February, 1910, was conducting a clothing and furnishing store in the city of Milwaukee, and that he in this month of February became financially embarrassed, which resulted in subjecting him to bankruptcy proceedings, and on March 2, 1910, was adjudged a bankrupt and a trustee was appointed who acted until discharged by the court after de-

fendant effected a settlement with his creditors. In a subsequent bankruptcy proceeding the plaintiff's claim on the note in question in this action was allowed as a claim, and before this action was tried the sum of $378 was paid as a dividend thereon. It also appears that the defendant was granted a discharge from all debt on April 9, 1912; that plaintiff appealed from such order of discharge to the United States circuit court of appeals, and that the order of discharge was vacated and set aside in this circuit court of appeals on July 7, 1913, before the trial of this action.

Upon the trial of this case the defendant's acts and conduct in the administration of his business and financial affairs, from the time he borrowed $9,000 from the plaintiff to resume business in March, 1910, to the time of trial, were fully disclosed. They show that he repudiated his indebtedness to the plaintiff about the time his note of $500 became due in October, 1910; that he transferred his banking business from the plaintiff to another bank; that he conducted a clean-out sale in November, 1910, under circumstances of financial strain and in a manner which tended to show that he was manipulating the proceeds in ways calculated to conceal the real transactions and the disposition of the cash realized on such sales. Many of the transactions are characterized by secret and surreptitious dealings with his property and the disposition of the proceeds of his sales which were obviously injurious to his creditors and support the claim that he assigned, conveyed, disposed of, or concealed his property or was about to do so with intent to defraud his creditors. An attentive and careful examination of the facts and circumstances of the case convinces us that the court is amply sustained in its conclusion "That between November 10, 1910, and the time of the commencement, on November 19, 1910, of the attachment proceedings herein, as aforesaid, said defendant, *Fred Lachenmaier,* disposed of part of his property, to wit, certain sums of money aggregating $800, with intent to defraud his cred-

itors, and concealed part of his property, to wit, certain other sums of money which he secretly placed in the custody and control of Martin A. Graettinger, with intent to defraud his creditors." Upon the record it was clearly a question of inference of fact whether or not the defendant disposed of the $800 to his wife with intent to defraud his creditors and whether or not he concealed the moneys he secretly placed into the hands of Graettinger with like intent. The appellant does not dispute that he disposed of his property to the persons as found by the court; but contends that the court erred in finding that defendant did this with intent to defraud his creditors, asserting that this is a question of law and not of fact. Herein the learned counsel for appellant is not sustained. As stated in the recent case of *St. Louis C. P. Co. v. Christopher,* 152 Wis. 603, 140 N. W. 351, "Intent to defraud a creditor is an essential element of this subdivision of the attachment statute under consideration, and whether or not such intent exists is a question of fact. *Palmer v. Hawes,* 80 Wis. 474, 50 N. W. 341; *Curtis Bros. & Co. v. Hoxie,* 88 Wis. 41, 59 N. W. 581."

The circuit court properly awarded judgment against the defendant.

By the Court.—The judgment appealed from is affirmed.

WEBSTER, by guardian *ad litem,* Respondent, vs. CORCORAN BROTHERS COMPANY, imp., Appellant.

March 18—April 9, 1914.

Negligence: Injury to child: Duty to protect from danger.

1. If a person lawfully conducts operations in a place and manner liable to imperil the safety of children of tender years rightfully in the vicinity, and such children are or may be reasonably expected to be lawfully there, he owes to them the duty of exercising ordinary care to protect them from such peril.

2. Defendant's servants, by means of a rope and tackle operated by horses, were raising sacks of oats from a wagon standing in an alleyway to the third story of a barn. Plaintiff, about eight years old, and other boys had been playing with the rope and had been ordered away, but remained near by. A kink having formed in the rope, plaintiff was told by the driver of the horses to straighten it out. As he took hold of the rope near a pulley, the driver negligently started the horses and plaintiff's hand was drawn into the pulley and injured. The jury found that defendant's servants did not exercise ordinary care to prevent plaintiff from incurring danger from handling the rope. *Held*, that the defendant was liable for the injury.

APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Affirmed.*

Action for a personal injury.

The evidence, which was competent and material under the proceedings, established, or tended to establish, this: Into a public alleyway on which a barn abutted, on the 11th day of August, 1911, defendant's servants drove a team of horses drawing a wagon loaded with sacks of oats. The purpose was to unload the grain into the barn. The wagon was located alongside the building and operations commenced by means of a block and tackle. The appliance was so attached and operated by horses as to raise the sacks of grain from the wagon to a door in the third story of the barn. The rope ran through a pulley near the ground. As the horses moved away from such pulley the rope was near enough to the ground to be within easy reach of young children and liable to endanger their safety if they meddled with it. Plaintiff and other children did that and were ordered away. They remained near by till a kink formed in the rope which needed to be straightened out before the work could go on. Thereupon, the driver, instead of dropping his lines and restoring the rope to a working condition, requested plaintiff to do it. The man on the wagon, who had general charge of the work, interfered and ordered the boy away. The teamster persisted a while and then repeated his request to the boy and

in the manner of an order. The man on the wagon said nothing further. The boy now proceeded as he was told by the teamster without further objection from the man on the wagon. As the boy took hold of the rope near the pulley, the teamster, negligently, caused the horses to suddenly start whereby the former's hand was drawn into the pulley and injured.

The jury found plaintiff to have been injured as indicated; that defendant's servants did not know, but ought to have known, that plaintiff had hold of the rope when the horses started; that such servants did not exercise ordinary care to prevent plaintiff from incurring danger from handling the rope; that such fact was the proximate cause of the injury; that plaintiff neither knew, nor could reasonably have been expected to know, that his hand was likely to be caught when the horses commenced to move, and was not guilty of want of ordinary care proximately contributing to his injury; and that he was damaged to the amount of $3,000. Judgment was rendered for plaintiff accordingly.

For the appellant there was a brief by *Quarles, Spence & Quarles,* attorneys, and *I. A. Fish,* of counsel, and oral argument by *Mr. Fish.*

For the respondent there was a brief signed by *Cary, Upham & Black,* attorneys, and *C. W. Reeder,* of counsel, and oral argument by *Mr. Reeder.*

MARSHALL, J. Counsel for appellant present several matters for consideration which seem beside the case. A recovery was neither sought nor obtained upon the ground that the relation of master and servant existed between plaintiff and defendant when the former was injured. The law in respect to liability to a volunteer has no application, nor has liability of a master for the consequences of an act of his servant outside the scope of his employment, as by engaging some one to help him without authority, express or implied, to do so.

The question presented does not seem to involve serious difficulties. It was competent for appellant to unload its grain where it did. It was charged with knowledge that young children,—too young, without efficient warning and considerable oversight, to be free from peril of personal injury in case of being allowed to be near the rope,—were liable to be rightfully in the vicinity. In such circumstances it owed such children the duty of ordinary care to keep them without the zone of danger. In that respect, as claimed by counsel for respondent, the situation was quite similar to *Kelly v. Southern Wis. R. Co.* 152 Wis. 328, 140 N. W. 60, and *Secard v. Rhinelander L. Co.* 147 Wis. 614, 133 N. W. 45.

While it was not within the scope of the teamster's employment to invite or direct the boy to assist in handling the rope, it was within such scope and that of the man on the wagon, who was directing operations, to reasonably guard the rope from interference by children. If they failed in that respect, and in consequence the child received the injury, the principle of the *Kelly Case* fits the facts perfectly.

The principle involved may be concisely stated thus: If a person lawfully conducts operations in a place and manner liable to imperil the safety of children of tender years, rightfully in the vicinity, and such children are or may be reasonably expected to be lawfully there, he owes to them the duty of exercising ordinary care to protect them from such peril. That is true, as said in the *Kelly Case,* even in the event of the situation being such that a child could not be in peril without becoming a trespasser, if such an occurrence might reasonably be expected, under the circumstances, in the absence of exercise of ordinary care on the part of those conducting the work to prevent it. The duty to exercise such care, in such situations, is important. It is due to the innocents who are liable to be injured in case of such duty being neglected, and it is due to the public as well.

As said in the *Kelly Case:* "Conservation of child life and safety, as to artificial perils, is one of such importance that ordinary care may well hold every one responsible for creating and maintaining a condition involving any such with reasonable ground for apprehending that children of tender years may probably be allured thereinto."

Why does not the foregoing apply to the facts of this case? According to the verdict, defendant was responsible for a condition which was naturally calculated to, and in fact did, allure children of tender years to become so involved in it as to imperil their safety. The creation of the condition gave rise to the duty to exercise ordinary care for the safety of any such children. Not only was there failure to use such care, as in the *Kelly Case,* but there was an invitation to plaintiff to meddle with the rope,—breach of duty by commission as well as omission. The chief circumstance upon which defendant relied to defeat the plaintiff's claim there, that is, that the child was a trespasser in touching the rope, did not exist here. On the contrary there was an invitation to do the very thing which duty required ordinary care to prevent.

By the Court.—The judgment is affirmed.

McGARVEY, by guardian *ad litem,* Respondent, vs. INDEPENDENT OIL & GREASE COMPANY, Appellant.

March 18—April 9, 1914.

Master and servant: Workmen's Compensation Act: Cause of action against third person: Assignment to and by employer.

Where, under sec. 2394—25, Stats. 1913, an employer becomes the owner of a cause of action in tort which an injured employee "may have against any other party for such injury," the employee may assign such cause of action and the assignee, as the real party in interest, may sue thereon. The provision in said section that "such employer may enforce in his own name the liability of such other party" was not intended to render the cause of action nonassignable.

APPEAL from an order of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Affirmed.*

Plaintiff, a servant of Harley-Davidson Motor Company, while in the course of his employment, was injured by actionable negligence of defendant. Plaintiff made a lawful claim for his injury under the Workmen's Compensation Act. Such claim was settled and, thereby, the Motor Company succeeded to plaintiff's right against defendant. Thereafter, for a sufficient consideration, such company, in due form, assigned such claim to plaintiff who commenced this action to enforce it. These facts were duly alleged. Defendant demurred for insufficiency and defect of parties plaintiff, in that the Harley-Davidson Company was not joined, and appealed from an order overruling the demurrer.

Julius E. Roehr, for the appellant.

William L. Tibbs, for the respondent.

MARSHALL, J. It is conceded, as the fact is, that, in case of an employee, in the course of his employment, being injured by the actionable negligence of a third person, a statutory remedy accrues to him for compensation, against his employer and a common-law remedy against such third person, though he cannot have but one satisfaction. If he elects to pursue the latter remedy he waives the statutory right, and if he elects to pursue the former, the employer by succession,—*ipso facto et eo instanti,*—becomes the owner of the right against the wrongdoer and "may enforce the same in his own name." The statute, sec. 2394—25, Stats. 1913, thus provides:

"1. The making of a lawful claim against an employer for compensation under sections 2394—3 to 2394—31, inclusive [the Workmen's Compensation Law], for the injury or death of his employee shall operate as an assignment of any cause of action in tort which the employee or his personal representative may have against any other party for such injury or death; and such employer may enforce in his own name the liability of such other party."

"2. The making of a claim by an employee against a third party for damages by reason of an accident covered by sections 2394—3 to 2394—31, inclusive, shall operate as a waiver of any claim for compensation against the employer."

In case of the employer becoming, in the manner indicated, the owner of a claim for injury to his employee, is such right a mere personal possession of a remedy for protection against loss growing out of the statutory liability, or is it a property right which the employer may deal with the same as an ordinary thing in action,—personally, judicially enforce it or assign it, affording the assignee, as the real party in interest, the right to proceed as legal owner?

In a broad sense, such a claim as the one we are dealing with is a mere chose in action. *Bennett v. Bennett,* 116 N. Y. 584, 23 N. E. 17. It is an incorporeal thing, resting in action,—remediable by an ordinary judicial remedy, as distinguished from a thing in possession. It is assignable and survivable. *Lehmann v. Farwell,* 95 Wis. 185, 70 N. W. 170; *Nemecek v. Filer & S. Co.* 126 Wis. 71, 105 N. W. 225; *Brown v. C. & N. W. R. Co.* 102 Wis. 137, 77 N. W. 748, 78 N. W. 771.

Thus it will be seen that an ordinary claim for damages for a tortious injury to the person, notwithstanding it was otherwise at common law, is a property right which may pass by assignment or operation of law, with the incidental right to a judicial remedy, by and in the name of, the real party in interest, to enforce it. That is the thing which, under sec. 2394—25, Stats., in the circumstances there mentioned, is waived or becomes possessed by the employer, according to the facts.

In providing that the right of the employee shall move from him and vest in his employer by the former making a lawful claim against the latter under the Workmen's Compensation Law, did the legislature intend that, in the transit, it should lose the element of assignability? It is suggested that such is the case because of the language "and such em-

ployer may enforce in his own name the liability of such other party." Was not that language used as a mere declaration of existing law that the real party in interest may and must sue in his own name, and that neither the claim nor the proceeds thus obtained shall be regarded, in any sense, as held in trust for the benefit of the employee?

The statute makers seem to have contemplated that, equitably, a wrongdoer, in the circumstances under discussion, is the one primarily liable; that the statutory right of the injured man should not work for the protection of the tortfeasor; but if insisted upon, the other right shall pass to the employer as an equivalent. The idea was not that the employer should become possessed of the common-law right for mere purposes of indemnity. That seems plain, because of the transition not waiting upon actual payment of the statutory claim, or the enforcement of such common-law claim being limited to the measure of the employer's payment to discharge the statutory liability. In the circumstances mentioned in the statute, the rights of all persons become fixed upon the event of the employee, by action in legal form, making a choice between the two ways open to him. That against the employer being chosen; that against the wrongdoer immediately passes, by operation of law, to such employer. The status then is, according to the letter of the statute, this: The sole source of compensation for the employee is the employer; but, without prejudice to the liability of the wrongdoer, he remaining answerable just the same, but to the then real party in interest, the employer. No different conclusion is contended for by counsel for appellant, except by construction of the statute.

Ambiguity in a statute is a condition of judicial construction. When uncertainty of meaning, with reasonable clearness, begins the duty of judicial construction arises; but so long as there is no need for construction, to attempt it is to pass the line between the judicial and the legislative function. So if the legislative intent in the statute in question be not pretty clearly involved in obscurity, it must be presumed

to furnish the best and, really, the only means for its exposition.

There does not seem to be any obscurity in the statute when viewed in the literal sense. Is there any when we apply it to the situation with which the legislature dealt? None is perceived. To give the employee, at his option, a source of indemnity for his loss without benefiting the wrongdoer or necessarily impoverishing the employer, is reasonable and quite the natural thing. It was very easy to have changed the character of the common-law claim against the wrongdoer from an assignable to an unassignable claim, or have limited it to a mere instrumentality for indemnity. Neither was done. There is nothing unreasonable or absurd in the statute from any viewpoint that we have been able to measure it. Before its enactment the employer could purchase an employee's claim for damages against one who had wrongfully injured him in his person or his property, and enforce it in his own name. In such a case the amount paid for the claim would not militate, necessarily, against its enforceability, or the measure of the recovery, or in any way affect the claim as to assignability. The letter of the statute, as well as its purpose, seems to be that, in case of a compulsory purchase of such a claim the nature of it shall not at all be changed. The use of the word "may" instead of the word "shall" or some other word indicating that the claim in passing by the statutory assignment loses its assignability, pretty clearly shows a purpose to provide for the creation of a status of sole ownership as distinguished from one in trust for the employee.

By the Court.—The order is affirmed.

SCHMUHL, Respondent, vs. MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Appellant.

March 18—April 9, 1914.

Parties: Pleading: Cross-complaint: Discretion: Appealable orders.

1. In an action for malicious assault upon a passenger by a street-car conductor in defendant's employ, it would have been a proper exercise of the trial court's discretion, upon defendant's motion, to require that the conductor be made a party defendant and to permit a cross-complaint to be served upon him as provided in sec. 2656a, Stats.
2. An order denying a motion to bring in a person who may be a proper but is not a necessary party is not appealable.

APPEAL from an order of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Dismissed.*

The complaint in this action charged the defendant with liability for wrongful and malicious assault upon the plaintiff by a street-car conductor in the defendant's employ while plaintiff was riding as a passenger on one of its cars in the city of Milwaukee. Upon service of the complaint the defendant moved the court for an order requiring plaintiff to make the conductor who committed the assault a party defendant. This motion was denied, and defendant then moved the court for leave to serve its proposed cross-complaint on said employee, and asked the court to prescribe the method and manner of serving it. This motion was denied, and from the order denying the motion this appeal is taken.

For the appellant there was a brief by *Van Dyke, Rosecrantz, Shaw & Van Dyke,* and oral argument by *James D. Shaw.*

William L. Tibbs, for the respondent.

BARNES, J. We do not see how the presence of the conductor as a party defendant could prejudice the plaintiff or seriously complicate the issues to be tried, and we think it

would have been a proper exercise of discretion on the part of the trial court to have ordered that he be brought in as a party and that a cross-complaint be served upon him as provided by sec. 2656*a*, Stats. This statute in form confers a discretionary power on circuit courts, and we have very recently decided that it does not go farther in fact. *Kresge v. Maryland C. Co.* 154 Wis. 627, 143 N. W. 668. Mention of this statute is not made in the opinion, but it was called to the attention of the court and was considered when the case was decided.

This court has often determined that an order denying a motion to bring in a person who may be a proper but is not a necessary party is not appealable. *Reinhart v. Fire Asso.* 93 Wis. 452, 67 N. W. 701; *Cook v. Menasha,* 95 Wis. 215, 70 N. W. 289; *Wechselberg v. Michleson,* 105 Wis. 452, 81 N. W. 657; *State v. Wis. T. Co.* 134 Wis. 335, 341, 113 N. W. 944. These cases rule the present one, and it must be held that the order is not appealable.

By the Court.—Appeal dismissed.

CITY OF MILWAUKEE, Appellant, vs. PLATH, Respondent.

March 18—April 9, 1914.

Assault and battery: Direction of verdict: Appeal: Harmless errors.

Where, upon a trial for an assault and battery in violation of a city ordinance, there was such a conflict in the testimony as ordinarily calls for determination by a jury, but both the district court and, on appeal, the municipal court directed a verdict of "not guilty," and it is extremely doubtful whether a different result would be reached by any jury, the judgment of acquittal should be affirmed on the ground that the error did not affect any substantial right of the city.

APPEAL from a judgment of the municipal court of Milwaukee county: A. C. BACKUS, Judge. *Affirmed.*

The defendant was arrested for committing an assault and

battery upon one Minzer, July 25, 1912, in violation of a city ordinance. He was tried in the district court and at the close of the trial the court directed a verdict of not guilty. The city appealed to the municipal court, where a like result followed. From a judgment entered on a verdict directed in favor of the defendant the plaintiff appealed.

For the appellant there was a brief by *Daniel W. Hoan,* city attorney, and *Mark A. Kline,* assistant city attorney, and oral argument by *Mr. Kline.*

For the respondent there was a brief by *Rubin & Zabel,* attorneys, and *F. L. Fawcett,* of counsel, and oral argument by *W. C. Zabel.*

VINJE, J. The complaining witness, Minzer, testified that on July 25th he was hired by defendant to work in his restaurant and that he understood his day's work closed at 7 o'clock in the evening. A little after 7 he went down stairs to get his coat from the cloak room. There he met defendant, who told him to go back to work till 8 o'clock. Minzer refused, and demanded his money. A dispute arose in which both profanity and obscenity were indulged in, especially by Minzer. Defendant had in his hand a small stick of wood, about half an inch thick and nearly a foot long, to which keys were attached, and Minzer claims defendant struck him with this stick on the head while he was walking towards the cloak room and without any offer of violence on his part. The defendant testifies that he struck Minzer just as the latter was in the act of assaulting him and that the blow given was in self-defense. In this he is corroborated by three other eyewitnesses to the altercation. It is true there is here a conflict of testimony that ordinarily should be submitted to the jury for determination. But in view of the fact that two courts who saw and heard the witnesses have directed a verdict for defendant, we have reached the conclusion that the judgment should be affirmed. It is extremely doubtful, in view of the whole evidence in the case, if a different result

would be reached by any jury. It cannot therefore be said that the error complained of has affected appellant's substantial rights. In such cases the statute (sec. 3072*m*, Stats. 1913) and our decisions (*Johnson v. Iron River,* 149 Wis. 139, 135 N. W. 522) alike require an affirmance of the judgment.

By the Court.—Judgment affirmed.

BERRY and another, Respondents, vs. WADHAMS OIL COMPANY, Appellant.

March 18—April 9, 1914.

Sales: Oral evidence affecting written contract: Implied warranty that goods are merchantable: Breach by vendee: Liquidating damages.

1. Where a written contract of sale does not show that the sale was made by sample, evidence that such was the fact is not admissible to affect the contract in any way.
2. Although an executory contract of sale of goods at a distance, not open to the inspection of the vendee, contains no express warranty of quality, there is an implied warranty that the goods are merchantable in quality; hence evidence that gasoline tendered by the vendor under such a contract was unmerchantable because of its obnoxious odor was admissible.
3. Evidence that the term "74-degree gasoline" in a written contract of sale meant, as used in the trade, a product with certain qualities as to color and smell, did not tend to vary the contract and was competent.
4. If the vendee in an executory contract of sale repudiates it without just cause, the vendor may properly treat the contract as terminated and sell the property for cash for the purpose of liquidating the damages.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Reversed.*

This was an action brought by vendor against vendee to

recover damages for the breach of two contracts for the sale and delivery of gasoline. A verdict for the plaintiffs was directed, and the defendant appeals. It appeared without dispute that on January 23, 1911, the parties made two written contracts, one for the sale of 150,000 gallons of "74-degree gasoline at 11 cents per gallon, f. o. b. refinery . . . , said gasoline to be not less than 74-degree gravity and to be shipped in equal quantities each month as follows, about 12,000 gallons;" the other for the sale of 30,000 gallons of "76-degree gasoline at 11¾ cents per gallon, f. o. b. refinery," to be shipped in equal quantities monthly, at the rate of about 3,000 gallons per month. It appeared further that three carloads of the 74-degree gasoline were shipped and delivered by the plaintiff to the defendant, and a fourth car of the same kind tendered, which was refused by the defendant on account of its strong odor. Considerable correspondence passed between the parties, and the defendant declined to receive any gasoline of either of the kinds contracted for if it bore the strong odor of the 74-degree gasoline which had already been delivered. The gasoline which plaintiffs proposed to deliver under both of the contracts possessed the same odor, and both parties understood this fact, hence no tender of the 76-degree gasoline was made, though plaintiffs were ready and willing to tender delivery of the same. The plaintiffs then sold out the entire undelivered balance of the gasoline covered by the two contracts for eight and three-fourths cents per gallon, and brought this suit to recover their damages.

It was undisputed that there were three different commodities known as gasoline, *i. e.* refinery or straight-run gasoline, compressor or casing-head gasoline, and blended gasoline, the latter kind being a recently developed variety, the qualities of which were unknown to the defendant, and which was produced only by the plaintiffs and one other concern. The defendant by answer claimed that the sale was by sample and that the gasoline tendered was not equal in quality to the sample by reason of its obnoxious odor. It appeared that

at the time of the making of the contracts both parties understood that their dealings related to blended gasoline, and the defendant, against objection, offered evidence tending to show that the sale was by sample and that the sample furnished was inoffensive in odor. The defendant also offered evidence tending to show that the words "74-degree gasoline" had a definite and well established meaning when used in the trade, namely, a waterwhite gasoline of sweet or nonoffensive odor. The defendant also offered evidence to the effect that gasoline must be free from the offensive odor which the plaintiffs' gasoline possessed in order to be merchantable. All of this evidence was finally stricken out by the court, and a verdict for the plaintiffs for damages computed by the court was directed and rendered.

For the appellant there was a brief signed by *Marshutz & Hoffman,* attorneys, and *J. H. Marshutz* and *W. C. Quarles,* of counsel, and a reply brief by *Marshutz & Hoffman,* attorneys, and *J. H. Marshutz* and *Quarles, Spence & Quarles,* of counsel; and the cause was argued orally by *Mr. Marshutz* and *Mr. I. A. Fish.*

For the respondents there was a brief by *Speer, Weigle & Moore* and *Walter Drew,* and oral argument by *Mr. Drew.*

WINSLOW, C. J. In this case it is held:

1. The contracts of sale being in writing and not showing that the sales were made by sample, evidence that such was the fact is not admissible to affect the contracts in any way. *Wiener v. Whipple,* 53 Wis. 298, 10 N. W. 433.

2. This being an executory sale of goods at a distance, not open to the inspection of the vendee and there being no express warranty of quality, there was an implied warranty that the goods were merchantable in quality, and hence evidence that the gasoline tendered was unmerchantable on account of its obnoxious odor was admissible and should not have been stricken out. *Merriam v. Field,* 24 Wis. 640;

T. B. Scott L. Co. v. Hafner-Lothman Mfg. Co. 91 Wis. 667, 65 N. W. 513.

3. The word "gasoline" being generic and in a sense indefinite because it covers a number of the lighter products of petroleum differing in their characteristics, it was competent for the defendant to introduce evidence tending to show that the expression "74-degree gasoline," as used in the trade, meant a product with certain qualities as to color and smell. This evidence does not tend to vary the contracts, but to translate them from the language of trade into the language of people generally. *Burstein v. Phillips,* 154 Wis. 591, 143 N. W. 679.

4. The contracts being executory, if they were repudiated by the defendant without just cause, the plaintiffs might properly treat them as terminated and sell the property for cash for the purpose of liquidating the damages. *Woodman v. Blue Grass L. Co.* 125 Wis. 489, 103 N. W. 236, 104 N. W. 920; *Pratt v. S. Freeman & Sons Mfg. Co.* 115 Wis. 648, 92 N. W. 368.

By the Court.—Judgment reversed, and action remanded for a new trial.

MEHLOS, Appellant, vs. CITY OF MILWAUKEE and others, Respondents.

March 18—April 9, 1914.

Constitutional law: Police power: Limitations: Municipal corporations: Regulation of public dances and dance halls: Authority, how given: "General welfare" clause in charter: Ordinances: Validity: Classification: Licenses: Granting, refusing, and revoking: Power of mayor not arbitrary: Powers of police officers.

1. To be valid a police regulation must be reasonable. There must be reasonable ground for the police interference, the means adopted must be reasonable for the accomplishment of the

purpose in view, and the degree of interference must be within the boundaries of reason.

2. As a rule, fundamental limitations of regulations under the police power are found in the spirit of the constitution, not in its letter, but are as efficient as if clearly expressed.
3. Regulation within the constitutional scope of the police power makes constitutional guaranties efficient; and when an act of the legislature is said to be unconstitutional because unreasonable, the idea involved is that it impairs or destroys some inherent right instead of conserving it.
4. Public dances or dance halls, since they are liable to be characterized by disorderly conditions or lead to breaches of the peace or promote immorality, are proper subjects for police regulation.
5. The power to regulate such public dances and dance halls by requiring them to be licensed and to pay license fees need not be given to a city expressly and unmistakably. It is sufficient if general terms in the general welfare clause of the city charter show a reasonably clear purpose to clothe the municipality with such power.
6. The grant of discretionary power to the common council by sec. 3, ch. IV, Milwaukee Charter, to enact such ordinances "for the government and good order of the city— . . . for the suppression of vice—for the prevention of crime— . . . as they shall deem expedient," etc., plainly confers authority to legislate in respect to public dances and dance halls.
7. An ordinance requiring, among other things, that every public dance hall shall obtain a license annually; that no such license shall be issued until it shall be found that the hall complies with and conforms to all ordinances, health and fire regulations of the city, is properly ventilated and supplied with toilet conveniences, and is a safe and proper place for the purpose; that the license may be canceled for causes stated; and that no public dances or balls shall be held until after being reported to the mayor and approved by him, is reasonable and does not violate any of the guaranties of the federal constitution.
8. Nothing in the federal constitution exempts citizens of the United States from reasonable police regulations as regards person and property, or prevents legitimate classification for the purpose of police regulation.
9. Classification for purposes of police regulation cannot ordinarily be made with such exactness that all the dangers to be guarded against will be found within the boundaries of the class to which the regulation is made to apply. All that is required is that there must be, in general, some reasonable

basis on general lines for the division; and all reasonable doubts are to be resolved in its favor.

10. The fact that many of the things which an ordinance regulating public dances and dance halls was designed to guard against may occur as well at a dance where patrons attend by invitation, and that other dances may be held at places and under conditions quite similar to those of such public dances as are within the ordinance, does not render the classification illegitimate or the ordinance void.

11. Where, under such an ordinance, the mayor must refer all applications for dance-hall licenses to the chief of police for an investigation as to whether the place satisfies all the requirements of the ordinance, and such officer may call to his assistance three other city officials, and must make a written report to the mayor accompanied by his opinion as to whether the application should be granted or refused, the ordinance cannot be held void on the ground that it clothes the mayor with arbitrary power to grant or refuse the license.

12. Nor is such an ordinance rendered void by the fact that power to revoke the license is lodged with the mayor, where the grounds of revocation are clearly specified and the ordinance clearly, by implication, provides that the mayor in performing his duties shall proceed as a *quasi*-judicial tribunal.

13. A provision in such an ordinance giving authority to certain police officials to put an end, summarily and without a hearing, to a public dance in case of the violation of the ordinance, the commission of any indecent act, or the happening of any disorder of a gross, violent, or vulgar character, is a reasonably necessary and a proper provision.

APPEAL from an order of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Affirmed.*

Action to restrain enforcement of a city ordinance upon the ground of its being unconstitutional. The following is such ordinance:

"Section 1. The term 'public dance' or 'public ball,' as used in this ordinance, shall be taken to mean any dance or ball to which admission can be had by payment of a fee or by the purchase, possession or presentation of a ticket or token in which a charge is made for caring for clothing or other property or any other dance to which the public generally may gain admission with or without payment of a fee. The term 'public dance hall' as used herein, shall be taken to mean any

room, place or space in which a public dance or public ball may be held, or hall or academy in which classes in dancing are held and instruction in dancing given for hire.

"Sec. 2. It shall be unlawful to hold any public dance or public ball or to hold classes in dancing within the limits of the city of *Milwaukee* until the dance hall in which the same may be held shall first have been duly licensed for such purpose. The application for such license shall be granted in the same manner as providing for the issuing of licenses under chapter 27 of the General Ordinances of the city of *Milwaukee*.

"Each license granted hereunder shall expire on the first day of July of each year and the license shall be posted in a conspicuous place within the hall in which the dance is held.

"The annual license fee shall be five (5) dollars. This ordinance shall be printed in full upon each license issued, and each license shall by its terms be made subject to revocation, as hereinafter provided.

"Sec. 3. No license for a public dance hall shall be issued until it shall be found that such hall complies with and conforms to all ordinances, health and fire regulations of the city; that it is properly ventilated and supplied with sufficient toilet conveniences and is a safe and proper place for the purpose for which it is to be used.

"Sec. 4. The license of any public dance hall shall be forfeited or revoked by the mayor for disorderly or immoral conduct on the premises or for the violation of any of the rules, regulations, ordinances and laws governing or applying to public dance halls or public dances. If at any time the license of a public dance hall shall be forfeited or revoked, at least six months shall elapse before another license or permit shall be given for dancing on the same premises.

"Sec. 5. Every licensed owner of a dance hall shall, immediately upon application being received by him from any person, club or society to lease or rent his hall for the purpose of holding a public dance or ball therein, report to the mayor of the city of *Milwaukee* the name and address of such person, club or society, and the date when such public dance or ball is proposed to be held. The mayor shall at once make, or cause to be made, an investigation for the purpose of determining whether such dance or ball shall be held. If the mayor shall determine that the proposed dance or ball ought

not to be held, he shall, within five (5) days after receipt of the aforesaid notice of application for lease or rental, notify the licensed owner of such dance hall, in writing, that the proposed public dance or ball shall not be held therein, and the licensed owner of such dance hall shall thereupon refuse to permit such public dance or ball to be held in such hall. Failure on the part of the licensed owner of such hall to comply with the provisions of this section shall be sufficient cause for the revocation of the license of such licensed owner.

"Sec. 6. All public dance halls shall be kept at all times in a clean, healthful and sanitary condition, and all stairways and outer passages and all rooms connected with a dance hall shall be kept open and well lighted. The chief of police, a captain, a lieutenant, or a sergeant of police, shall have the power, and it shall be their duty, to cause the place, hall or room where any dance or ball is held or given to be vacated whenever any provision of any ordinance with regard to public dances and public balls is being violated or whenever any indecent act shall be committed or when any disorder of a gross, violent or vulgar character shall take place.

"Sec. 7. It shall be unlawful after 10 o'clock p. m. to permit any person to attend or take part in any public dance who has not reached the age of eighteen (18) years, unless such person be in company with a parent or natural guardian. It shall be unlawful for any person to represent himself or herself to have reached the age of eighteen years in order to obtain admission to a public dance hall or to be permitted to remain therein when such person in fact is under eighteen years of age, and it shall also be unlawful for any person to represent himself or herself to be a parent or natural guardian of any person, in order that such person may obtain admission to a public dance hall, or shall be permitted to remain therein when the party making the representation is not in fact either a parent or natural guardian of the other person.

"Sec. 8. The mayor shall refer all applications for dance hall licenses to the chief of police, who shall investigate, or cause to be investigated, each application to determine whether the dance hall sought to be licensed complies with the regulations, ordinances and laws applicable thereto, and in the making of such investigation the chief of police shall, when desired, have the assistance of the building inspector, the commissioner of health and the chief of the fire department.

The chief of police shall furnish to the mayor in writing the information derived from such investigation, accompanied by a recommendation as to whether a license should be granted or refused. No license shall be renewed except after inspection of the premises as provided herein.

"Sec. 9. All public dances shall be discontinued and all public dance halls shall be closed on or before the hour of 3 o'clock a. m.

"Sec. 10. Any person, persons, society, club or corporation who shall violate the provisions of this ordinance shall, upon conviction thereof, be fined not less than twenty-five ($25) dollars, and the cost of prosecution and not more than one hundred ($100) dollars and the cost of prosecution for each and every offense, and on default of payment thereof shall be imprisoned in the house of correction, Milwaukee county, for a period of not exceeding ninety (90) days."

The complaint contained appropriate allegations as to plaintiff being especially injured by the ordinance and challenged its validity.

The appeal is from a decision dissolving a temporary injunction. Such decision turned on whether the ordinance was valid.

For the appellant there was a brief by *Rubin & Zabel,* attorneys, and *Horace B. Walmsley,* of counsel, and oral argument by *W. C. Zabel.*

For the respondents there was a brief by *Daniel W. Hoan,* city attorney, and *E. L. McIntyre,* assistant city attorney, and oral argument by *Mr. McIntyre.*

MARSHALL, J. These are the basic propositions to be considered: Is the maintenance of public dance halls a proper subject for police regulation? Does the city of *Milwaukee* possess authority in respect to such matter? Are the means adopted legitimate?

The general nature of the police power has been too often defined to leave room for anything further to be said of a strictly original nature. This court dealt, generally, with the matter in the following and other cases: *State ex rel. Adams*

v. Burdge, 95 Wis. 390, 70 N. W. 347; *State ex rel. Winkler v. Benzenberg,* 101 Wis. 172, 175, 76 N. W. 345; *State ex rel. Milwaukee Med. Coll. v. Chittenden,* 127 Wis. 468, 519, 107 N. W. 500; *State v. Redmon,* 134 Wis. 89, 114 N. W. 137; *Bonnett v. Vallier,* 136 Wis. 193, 116 N. W. 885.

Notwithstanding mere reiteration is unnecessary and attempts to improve on what has gone before seem futile, we do well to follow that wise constitutional admonition:

"The blessings of a free government can only be maintained by a firm adherence to justice, moderation, temperance, frugality and virtue, and by frequent recurrence to fundamental principles." Sec. 22, art. I, Const.

That is more than a mere admonition voicing in another way the thought often expressed as "Eternal vigilance is the price of liberty." It is a declaration giving emphasis to the declared purpose of the fundamental law as involving restraint of anything in legislation invading inherent rights,—that freedom for which we are "Thankful to Almighty God" and for the conservation of which and security of "the blessings" for which, "governments are instituted among men, deriving their just powers from the consent of the governed." It points to the very vitals of the fundamental law and pictographs its spirit, making it visible to, and its beneficence appreciable by the commonest understandings.

It were better, perhaps, to speak of exercisable police power in the collective sense,—as that broad conception involved in the expression: It is the sovereign authority exercisable directly, where not expressly or inferentially prohibited, and otherwise, where not so prohibited, to pass laws regulating, reasonably, all those things which appertain to the public welfare.

Things may be within the police power, in the general sense, and not in the legal sense because expressly prohibited. Many things fall within such general sense which do not within the legal sense because impliedly prohibited. The heresy which once had some believers, that it is a power

above fundamental restraints, has been so completely exposed as to only now exist as a matter of history, which more excites our curiosity as to its origin and how the idea could have originated, in the light of any worth-while appreciation of our constitutional liberty, than challenges attention to any reason for a legitimate basis therefor. True, it is a great power. Without it the purpose of civil government could not be attained. It has more to do with the well-being of society than any other power. Properly exercised, it is a crowning beneficence. Improperly exercised it would make of sovereign will a destructive despot, superseding and rendering innocuous some of the most cherished principles of constitutional freedom. So it is said in *State v. Redmon,* 134 Wis. 89, 114 N. W. 137: "It may be extended disastrously, or restrained and administered beneficially, according as the judiciary shall perform its constitutional functions. Confined within its legitimate field of reasonable regulation it is essential . . . to the full accomplishment of the purposes of civil government."

Too much significance cannot be given to the word "reasonable" in considering the scope of the police power in a constitutional sense. It took much time, notwithstanding clear declarations, over and over again, on the subject here and by the federal supreme and other courts (*Lawton v. Steele,* 152 U. S. 133, 137, 14 Sup. Ct. 499; *Plessy v. Ferguson,* 163 U. S. 537, 16 Sup. Ct. 1138; *Rideout v. Knox,* 148 Mass. 368, 19 N. E. 390; and *Ely v. Niagara Co.* 36 N. Y. 297), for courts and text-writers, in general, to appreciate that the final evidentiary test of the legitimacy of a police regulation is whether it is reasonable under all the circumstances. No court has been more emphatic on the subject than this. *State v. Redmon, supra; State ex rel. Milwaukee v. Milwaukee E. R. & L. Co.* 144 Wis. 386, 397, 129 N. W. 623; *State ex rel. Adams v. Burdge,* 95 Wis. 390, 70 N. W. 347; *Bonnett v. Vallier,* 136 Wis. 193, 116 N. W.

885. In the latter case the court deduced the following from the many authorities in this and other courts:

"A police regulation must not extend beyond that reasonable interference which tends to preserve and promote enjoyment, generally, of those 'unalienable rights' with which 'all men are endowed' and to secure which 'governments are instituted among men.' . . . When it goes beyond the scope indicated and enters into the domain of the destructive, it is illegitimate and offends against some constitutional restraint, express or implied, ..."

There must be reasonable ground for the police interference and also the means adopted must be reasonable for the accomplishment of the purpose in view. So in all cases where the interference affects property and goes beyond what is a reasonable interference with private rights, it offends against the general equality clauses of the constitution, it offends against the spirit of the whole instrument, it offends against the provision against taking property without due process of law and against taking property for public use without first rendering just compensation therefor. So every police regulation must answer for its legitimacy at the bar of reasonableness.

Some confusion at one time existed on the subject discussed here because of expressions of judges as to a law or ordinance being void for unreasonableness. No provision could be pointed to in state or national constitution limiting legislative authority on that ground.

As a rule, fundamental limitations of regulations under the police power are found in the spirit of the constitution, not in its letter; but they are just as efficient as if expressed in the clearest language. As said before, the existence of the power, itself, is presumed from very necessity therefor,—to the end that the functions of government by, of, and for the people may be efficiently exercised, but in the very reason for its existence is seen the respect due to its limitations. The same

circumstances which imply the one imply the other. There we see the dignity of the term "reasonable" which has sometimes been omitted in describing the police power under our constitutional system.

The confusion was created by failure to appreciate that, by the use of such term, the characteristic of means was referred to, instead of the effect, while the latter is the real mischief which infracts the constitutional restraints.

That is to say, the legislative effort at regulation, within the police power, is not subject to condemnation, strictly speaking, because unreasonable, but because it impairs or destroys some inherent right instead of conserving it. In respect to inherent rights, all which conserves is reasonable; that which impairs or destroys is unreasonable. So when it is said that an act of the legislature is unconstitutional because unreasonable, the idea involved is that the interference with some inherent right is so great as to destructively affect it and so violates its guaranteed inviolability. Thus the conception that regulation, within the constitutional scope of the police power, makes efficient, constitutional guaranties instead of impairing or destroying them, while outside such scope the contrary is true. *State ex rel. Runge v. Anderson,* 100 Wis. 523, 533, 534, 76 N. W. 482.

Now, given a proper subject for police regulation,—it being understood that whether a given matter is such is wholly a judicial question, there is yet the field of appropriateness of means. Naturally, as the power is inherent in our system, of necessity, there must be some reasonable basis for legislative activity in respect to the matter dealt with, else the subject is outside the scope of legislative interference. However, given a subject in respect to which there is some reasonable necessity for regulation, fair doubt in respect thereto being resolved in favor of the affirmative, in case of the legislature having so determined, the degree of exigency is a matter wholly for its cognizance.

What is said as regards legitimacy of subjects for exercise of the police power may be repeated as to appropriateness of means; while given the two elements,—legitimacy of subject and appropriateness of means,—the degree of interference within the boundaries of reason is for the legislature to decide, there being left in the end the judicial power to determine whether the interference goes so far as to violate some guaranteed right,—regulate it so severely as to materially impair it, reasonable doubts being resolved in favor of legislative discretion.

With the elementary principles stated, in evidence, we may quickly reach the vital question upon this appeal. Public meetings and meeting places which are liable to be characterized by disorderly conditions or lead to breaches of the peace or promote immorality have, universally, been considered proper subjects for police regulation. Public dances and dance halls fall within the latter class. While, if conducted in a proper manner such a hall and its use may afford opportunity for innocent amusement, in the absence of any regulation, it tends to breed disorder, indolence, intemperance, immorality, and to otherwise lower the standard of people in the social state. Such places, conducted for gain, open, in general, to all who come in suitable order to be received, no other condition being exacted except the prescribed entertainment fee, are so liable to be centers of disturbance and character lowering or destruction, that they have been subjected to pretty severe regulation by statute and city ordinances, to preserve the possible benefits of such amusement places, and prevent the possible or probable abuses. They have been so regulated in Massachusetts by statute for many years. A violation of the law there is punishable much more severely than by the ordinance in question. Power is vested in administrative officers to determine the terms of the license and the terms and manner of its revocation. Neither legislative power is contemplated in the issuance of the li-

cense nor judicial power in the revocation,—only the discretion of the administrative officer, subject, of course, to answer in judicial remedies for any clearly unreasonable or arbitrary action.

Does the city of *Milwaukee* possess authority to legislate respecting the particular subject? It is conceded that, unless it was given such authority in its charter, it does not possess it.

True, as claimed, the power in question is only conferrable by language showing such purpose with reasonable clearness. The general principle in that regard, stated in *Chain Belt Co. v. Milwaukee,* 151 Wis. 188, 192, 193, 138 N. W. 621, is here reaffirmed. But that does not mean that such a power can be given only expressly and unmistakably. If general terms, in the general welfare clause, show a reasonably clear purpose to clothe the municipality with such power,—reasonable clearness being satisfied by a grant in clear terms covering a broad subject,—then the details subjects, within the entirety, are proper matters to be dealt with.

As said in *State ex rel. Elliott v. Kelly,* 154 Wis. 482, 143 N. W. 153, the general welfare feature of the city charter of the city of *Milwaukee* is very broad. It evinces a legislative purpose to afford the municipality the usual powers granted to cities of the kind. There is no rule requiring such a grant to be strictly construed so as to minimize its effect, rather the rule is that it should be construed, if construction be permissible and is needed, liberally to carry out the legislative purpose. Such purpose being plain, reasonable doubts as to the meaning of language used to effect it should be resolved in favor of the end the legislature clearly had in view.

Sec. 3, ch. IV, Charter of Milwaukee, page 54 (Compiled 1905), shows a grant of discretionary power to the common council to pass ordinances "for the government and good order of the city— . . . for the suppression of vice—for the prevention of crime— . . . as they shall deem expedient; and to declare and impose penalties, and to enforce the

same. . . ." The term for the "government and good order" of the city, by itself, is amply broad enough to cover the regulation of public places of amusement such as dance halls. It is very comprehensive as used in city charters. It covers the entire scope of reasonable police regulations to conserve the peace, the health, the safety, and the morals of the community, as will be seen by reference to 1 Dillon on Municipal Corporations (4th ed.) §§ 392 to 408 and notes. This court has so viewed its scope. *Ellinwood v. Reedsburg,* 91 Wis. 131, 64 N. W. 885.

Thus far we have found that the particular subject is a legitimate field for regulation under the police power, and that authority in that regard was plainly conferred upon the city of *Milwaukee.* We have now to see whether the means and extent of interference go beyond reasonable boundaries of conservation of the right to use property and to indulge in the amusements incident to public dances.

The plan of regulation is the usual one and the one contemplated by the charter. Its general feature is the creation of a disability to use a hall for public dances except upon condition of a permit being first obtained therefor, based on satisfactory proof of the place being fit for such gatherings as regards health, convenience, and safety; such permit to be subject to cancellation in case of violation on the premises of good order or good morals or of any municipal regulation of such places, and subject to a duty to obtain public approval in advance of such intended use, to keep the hall and its accessories in a fit condition for such gatherings, and not to permit the use of the hall on any day later than 3 o'clock a. m. nor after 10 o'clock p. m. to allow any one to attend and participate in dancing who shall not have reached the age of eighteen years, unless accompanied by a parent or natural guardian, and to prevent, during any use of the premises for a public dance, any gross behavior of a disorderly, violent, or vulgar character. Those detail features are common in such

ordinances and have never been held to be and, from an original standpoint, certainly are not unreasonable. They seem mild rather than harsh. The penalties for violation, as regards the proprietor at least, are not immoderate.

So it seems that if there is anything unreasonable in the ordinance it must be in matter of details of a strictly administrative character.

We may well observe, in passing, that the suggestion is made that the ordinance violates some of the equality guaranties of the federal constitution. There is no federal guaranty which exempts citizens of the United States from reasonable police regulations as regards person and property, *State ex rel. Kellogg v. Currens,* 111 Wis. 431, 87 N. W. 561, or which prevents legitimate classification for the purpose of police regulation. In case of such classification and the regulation affecting all members of the class alike, there is no violation of any equality clause of national or state constitution. These principles are so well understood that it would be a waste of energy to discuss them. As the classification in this case,—halls used for public dances,—obviously satisfies all essentials on the subject of legitimacy, and, just as obviously, the restraints of the ordinance bear equally upon all members of the class, we need not spend much time with this branch of the case, which is argued at some length in the brief of counsel for appellant.

The fact that many of the things which the ordinance was designed to guard against may occur as well at a dance where patrons attend by invitation, and that dances may be held at places and under conditions quite similar to those of such public dances as are within the ordinance, is not fatal to the classification. It is generally the case that a classification cannot be made so as to make a definite line within which may be seen all the dangers to be guarded against and without which there are no such dangers. The best that can be done is to keep within the clearly reasonable and practicable.

That is accomplished where there are such general characteristics of the members of the class as to reasonably call for special legislative treatment. That may be true, generally, and yet some of such characteristics sometimes be found to exist outside of the boundaries of the class. Exactness in division is impossible and never looked for in applying the legal test. All that is required is that there must be, in general, some reasonable basis on general lines for the division, all reasonable doubts to be resolved in favor thereof. There ends the judicial and commences the legislative function, each being dominant in its particular field. *State ex rel. Kellogg v. Currens, supra; State ex rel. Risch v. Trustees,* 121 Wis. 44, 98 N. W. 954; *State v. Whitcom,* 122 Wis. 110, 99 N. W. 468; *Bingham v. Milwaukee Co.* 127 Wis. 344, 106 N. W. 1071; *State v. Evans,* 130 Wis. 381, 385, 110 N. W. 241.

We are unable to perceive why the principle declared and applied in those cases does not answer counsel's contention at this point. The authorities cited to support the theory of illegitimate classification do not seem to fit the situation in hand. So far as we are advised, public dance halls have commonly been put in a class for the purpose of regulation and it has never been condemned.

On the subject of whether the administrative features of the ordinance are unduly severe, the main objection raised is in that the power is lodged in the mayor to refuse to issue a license and without assigning any reason therefor and without there being any standard fixed for him to go by nor any method for a review. The idea seems to be that this makes the owner of a hall which he desires to devote, in whole or in part, to use for public dances subject to the arbitrary will of the mayor.

Counsel misconceive the nature of the ordinance and the nature of the mayor's administrative duties. The ordinance, very distinctly, fixes a standard of fitness, so far as practicable, without danger of undue harshness. From the very

nature of the case, minor details had to be made matter of administration by appropriate officials. The place is required to conform to all ordinances, health and fire regulations, to be properly ventilated and supplied with sufficient toilet conveniences and to be a safe and proper place for the purposes for which it is used. Why does that not set up a quite definite reasonable standard? Before granting a license the mayor is required to refer the application therefor to the chief of police for an investigation and report as to whether the place satisfies all the calls of the ordinance. The investigator is required to call to his assistance three officials of the city, viz. the building inspector, commissioner of health, and the chief of the fire department. After investigation with the help of such three expert assistants, the investigator is required to make a report in writing to the mayor, accompanied by his opinion as to whether the application should be granted or refused. That report the mayor is required to consider and pass judgment upon in coming to a conclusion.

In view of the foregoing, what foundation is there for the claim that the ordinance clothes the mayor with arbitrary power in the matter of passing upon an application for a license, affording him opportunity, irremediably, to act upon his personal prejudice or mere caprice or some unworthy motive? It provides for a most careful, impartial, intelligent investigation by four city officials of high station, and contemplates that the mayor will honestly apply his judgment to the result. If he should refuse a license without doing so in the particular manner suggested, or refuse, under such circumstances as to clearly indicate the existence of some improper motive therefor, judicial remedies would be found ample to redress the wrong.

Power of a municipality to confer administrative authority on the mayor as in the ordinance in question, was upheld in *Milwaukee v. Ruplinger,* 155 Wis. 391, 145 N. W. 42. What was there said need not be repeated. We are unable to discover anything in the *Eubank Case,* 226 U. S. 137, 33 Sup.

Ct. 46, upon which appellant's counsel rely, out of harmony with this.

When it comes to the method ordained for revoking a license, though the power is lodged in the mayor, the grounds of revocation are clearly specified and, just as clearly, by implication, it is provided that the mayor shall proceed in the performance of his duties as a *quasi*-judicial tribunal.

There are several other details of the scheme of regulation, particularly, in respect to administrative features, which are urged should be looked upon as fatal, but we do not recognize any not the same or similar to those common to such police regulation and, generally, approved without even criticism. The authority of a police officer to put an end to a public dance upon the event of any provision of the ordinance being violated, or any indecent act being committed, or any disorder of a gross, violent, or vulgar character, is, we apprehend, common.

Complaint is made of conferring discretionary power upon the officials to act without any opportunity for any sort of a hearing. There is nothing novel about that, nor undue restraint upon liberty or property involved in it. It is a reasonably necessary provision, for the preservation of good order. It would be utterly useless to attempt to suppress such acts as that feature of the ordinance is designed to reach, if before action some sort of a judicial hearing were required. It must be remembered that the police power, as before indicated, is grounded on necessity. The basic reason for it renders details of dealing with a particular subject legitimate which are reasonable under all the circumstances, and are not expressly prohibited.

It is a mistake to suppose that a government by law contemplates law to protect one in liberty to do whatever he sees fit and do it as he sees fit. When we say, ours is a government by law and not by men, we mean that ours is a government based on rights with laws to preserve and conserve those rights, and men to administer those laws. There must

be the human element or there could be no administration. Without administration, law would have no vitality. Without law to preserve and conserve rights, vitalized by proper administration, there would be no rights and the very purpose for which governments are founded would fail of effectuation.

Other features of the ordinance to which our attention is called are as wanting in merit as those which have been discussed. They will be passed with the assurance that they have been considered with full appreciation of the nature of police regulations and their limitations; that the very existence of the power lies in the necessity for personal and property rights to be fenced about, to some extent, in order to be possessed beneficially,—really promote life and happiness,—and that freedom, under our constitutional system, means liberty to enjoy that which is inherent under such restraints as to repress that which is detrimental to a worth-while social state in order to conserve that which promotes and is necessary to it. Thus small limitations upon liberty of individual action are required,—are absolutely essential in order that rights, in the aggregate, may be possessed efficiently. The constitutional guaranty of their possession, constitutionally commands such exercise of the police power as is essential to preservation and conservation thereof. The degree of such exercise rests in legislative wisdom up to the point where it would be obviously operated to destroy instead of conserve. There comes in the constitutional bar. There is the respect which all men owe to it and for which all ought to bow to it. The lesson which needs most to be learned, is that liberty, under a popular government, contemplates many restraints; that such restraints are necessary to civil society, and that all must yield to them and appreciate that, within the limitations mentioned, in legislative wisdom rests the particular degree of restraint.

No more need be said in this case. It is presented with confidence and good faith, yet has no special merit. We

have not found it necessary or advisable to discuss the many authorities cited to our attention. It is easy to accumulate eloquent passages from legal opinions as regards sacredness of individual liberty. That could not well be too much exalted. Yet sometimes in picturing its significance respecting some particular condition, language is used which, if not restrained to such or similar conditions, would give rise to a very mischievous idea of what liberty, in a worth-while social state, means. When understood, the citations will not support anything out of harmony with what is said in this opinion. If it were otherwise, it would not change the result, because that rests on principles which cannot be changed by any concrete situation to which they may have been applied or any mode of expression in applying them.

By the Court.—The order is affirmed.

INGLEHARDT, Administrator, Appellant, vs. MUELLER, Respondent.

March 18—April 9, 1914.

Landlord and tenant: Safety of hallway in apartment building: Duty of lessor: Lease construed: Negligence: Death of child.

1. Where, by the terms of a lease of an apartment in his building, the lessor retained possession and control of a hallway and the fixtures therein, it being expressly declared that such hallway was not leased and was only to be used by the lessee for ingress and egress, it was the lessor's duty to maintain the hallway in a reasonably safe condition for such use by his tenants.
2. Where, in such case, a radiator in the hallway fell, by reason of being insecurely attached to the wall, and killed a child of the lessee, and the lessor ought, in the exercise of ordinary care, to have discovered the danger and repaired the fastening before the time of the accident, the lessor was guilty of actionable negligence even though he had no actual knowledge of the defect.

APPEAL from a judgment of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Reversed.*

This is an action to recover damages for the death of Gor-

don William Inglehardt, seven years of age, the son of the plaintiff, who died as a result of a four-section, 255-pound radiator falling on him. The radiator was attached to the wall of the entrance of an apartment building in which decedent and his parents lived. The decedent's father entered into a lease with the defendant, *Mueller,* the owner of the building, on or about the 31st day of October, 1911, whereby *Mueller* leased to the plaintiff an apartment on the first floor of this building. The following are covenants in the lease:

"*Not liable.*—It is mutually agreed and understood that the said lessor shall not be liable for any damage occasioned by failure to keep said premises in repair, and shall not be liable for any damage done or occasioned by or from plumbing, gas, water, steam or other pipes, or sewerage, or the bursting, leaking or running of any cistern, tank, washstand, water-closet or waste pipe in, above, upon or about said building or premises, nor for damage occasioned by water, snow or ice being upon or coming through the roof, skylight, trap door or otherwise, or for any damage arising from acts or neglect of cotenants or other occupants of the same building." . . .

"*To be kept clean.*—It is mutually agreed and understood that the said lessee shall keep the said premises in a clean and tenantable condition.

"*Repair to plastering, plumbing, etc.*—That said lessee will make all repairs required to the walls, ceiling, paint, plastering, plumbing work, pipes and fixtures belonging to said apartments, whenever damage or injury to the same shall have resulted from misuse or neglect, to be replaced in former condition with materials of equal quality, and to the satisfaction of lessor, or that said lessor may make such repairs and charge the same to said lessee, and that said lessee will pay the entire expense thereof.

"*Halls.*—It is distinctly understood that the front and rear halls, laundry, lawn and back yard are not leased, but the hallways may be used by the lessee for ingress and egress."

In the front hall of the building the above mentioned radiator was attached to the wall some two and one-half feet from the floor. It rested upon two hooks or braces screwed into a

timber which was fastened to the wall with screws extending through the lath and plaster. Two hooks at the top were so fastened to the wall as to hold the top in against the wall.

On the day of the accident the deceased and his mother came into the hall. At this time the decedent, who was on his way out through the hall, observed a funeral passing, stopped to see it, and placed one foot, lightly, on the wheel valve of the radiator, his other foot resting on the second step, which was about on a level with the valve. While in this position the radiator suddenly fell upon the decedent and injured him to an extent which caused his death within about twenty minutes.

The action was tried in the civil court of Milwaukee county to the court without a jury. This court found that the defendant, *Mueller,* neglected to have the hall radiator securely fastened to the wall by failing to provide proper and safe hooks at the top thereof to hold it firmly in place and prevent its falling by turning out from the wall as it did when it fell on this boy; that the defendant in the exercise of ordinary care ought, before the day of this accident, to have discovered that this radiator was not securely fastened to the wall and should have caused it to be securely and safely attached and held in place; that he as a man of ordinary intelligence ought to have foreseen that the danger of the radiator falling from its place would likely cause some one an injury; that such negligence of the defendant was the proximate cause of the decedent's death; and awarded the plaintiff judgment for the recovery of damages in the sum of $1,500.

An appeal was taken from this judgment to the circuit court for Milwaukee county. On the hearing of the case before the circuit court upon the record, the circuit court considered that the evidence sustained the facts found by the civil court in so far as that court found that the radiator was negligently left in an unsafe condition of attachment to the wall; that the defendant in the exercise of reasonable care ought, before the time of this accident, to have discovered this

defective condition of suspending the radiator, and that he in the exercise of ordinary care ought to have discovered and repaired this defect in placing the radiator; and that this proximately caused the decedent's death. But the court found that the defendant, under the relationship existing between defendant and the plaintiff as his tenant, owed no legal duty toward the plaintiff and the decedent to have the radiator securely and safely fastened to the wall to prevent its falling on the decedent as it did, and that no cause of action existed in the plaintiff's favor to sustain the judgment awarded by the civil court, and therefore reversed the same and awarded judgment in the defendant's favor dismissing the plaintiff's complaint. This is an appeal from the judgment of the circuit court.

For the appellant there was a brief by *Glicksman, Gold & Corrigan,* attorneys, and *Joseph E. Tierney,* of counsel, and oral argument by *W. L. Gold.*

James T. Drought, attorney, and *Lawrence A. Olwell,* of counsel, for the respondent.

SIEBECKER, J. The circuit court in awarding judgment dismissing the plaintiff's complaint held that the defendant, under his relationship to the plaintiff and family resulting from the provisions of the lease letting to the plaintiff the apartment adjoining the hall of the building where this radiator was located, owed no duty to have the radiator safely attached to the wall of the building, because the hall constituted a part of the leased premises. As shown in the foregoing statement, the lease contained the following provision respecting the hallways:

"It is distinctly understood that the front and rear halls, laundry, lawn and back yard are not leased, but the hallways may be used by the lessee for ingress and egress."

At the trial of the case the civil court found that "said *August Mueller* did actually undertake to keep the hallway in safe, suitable, and proper repair and condition for use by

the said *W. A. Inglehardt* and members of his family, the public, and the other tenants and members of their families in said apartment building." On appeal the circuit court held that the civil court erred in this conclusion because "there is no evidence that *Mueller* expressly agreed to keep the hallway in safe, suitable, and proper repair and condition for use. To that extent the finding as well as the conclusion that *Mueller* had agreed and that it was the duty of *Mueller* to keep the hallway in such condition are without support." The circuit court declares that no such agreement can be implied from the provisions in the lease, and refers to *Kuhn v. Sol. Heavenrich Co.* 115 Wis. 447, 91 N. W. 994, as applicable to this case. That case is one wherein the tenant sought to recover damages to his goods caused by an alleged want of repair, for breach by the landlord of an implied covenant to repair. We have no such case before us. The cause of action in the instant case is for damages alleged to have been caused by the defendant's negligence in that he failed to perform his legal duty to have the radiator securely and safely attached to the wall in the hall of the building. The question is, Was it defendant's legal duty, under the relation of the parties, to have this radiator securely and safely attached to the wall and thus prevent injury to persons lawfully using the hall? The stipulation in the lease above quoted clearly indicates that the defendant retained possession and control of the hall and the fixtures therein; for it expressly declares that the hall is not leased and that it was only to be used by the tenants for ingress and egress. The defendant's acts and conduct in caring for and controlling the hall clearly indicate that he understood the hall and its contents were not leased and remained in his possession. He exercised full control over it and maintained it for use in connection with the premises leased to the various tenants of the building. It is also provided in the lease that the premises leased to the plaintiff were to be kept in repair and in a clean and tenantable condition by the lessee. It is undisputed that these provisions im-

posed no duties on the plaintiff to repair and keep clean and tenantable the hallway. From these conditions of the lease it is manifest that the hallway was no part of the premises leased and that the defendant retained possession thereof. In the light of the relationship of the parties as established by the lease, under which the defendant expressly undertook to provide this hall for the tenants occupying the leased portions of the premises for ingress and egress, it is manifest that it was the defendant's duty to maintain the hall in a reasonably safe condition for such use by his tenants. The facts as found by the trial court show that the defendant failed to perform this duty and that his failure to do so caused the radiator to tip over and fall on the decedent, producing his death. As this court declared in referring to the case of *Looney v. McLean,* 129 Mass. 33, "the landlord was held liable to his tenant for negligence upon the same principle that he would have been to a stranger for inducing a tenant to use a portion of the building which he undertook to keep in order, knowing that it was unsafe." True, it is not found that the defendant had actual knowledge that this radiator was insecurely fastened to the wall, but the trial court found on ample evidence that the defendant in the exercise of ordinary care ought to have discovered this danger and ought to have repaired it before the time of this accident, and that he ought to have foreseen that his neglect in this respect might cause an injury to persons lawfully using this hall. Under the facts established and found by the trial court the defendant was guilty of actionable negligence, and the judgment awarded by the trial court is sustained by the record. It follows that the circuit court erred in reversing the judgment of the civil court. For precedents showing upon what grounds the circuit court can reverse a judgment of the civil court of Milwaukee county, see *Pabst B. Co. v. Milwaukee L. Co., post,* p. 615, 146 N. W. 879, and *Hanna v. C., M. & St. P. R. Co., post,* p. 626, 146 N. W. 878.

By the Court.—The judgment appealed from is reversed, and the cause remanded to the circuit court with direction to enter judgment affirming the judgment entered by the civil court, and for costs.

PABST BREWING COMPANY, Appellant, vs. MILWAUKEE LITHOGRAPHING COMPANY, Respondent.

March 19—April 9, 1914.

Appealable orders: Appeal from Milwaukee civil court: New trial, when to be ordered: "Manifest prejudicial error:" Landlord and tenant: Notice terminating tenancy from year to year: Form and sufficiency: New tenancy from month to month: Evidence.

1. The provision of sec. 3069, Stats., authorizing an appeal from an order of the circuit court granting a new trial, applies to such an order made by the circuit court for Milwaukee county in a case brought there by appeal from the civil court.
2. A notice in writing to a tenant from year to year, given on March 26th, to the effect that his lease expires on April 30th (the end of the rental year) and that from and after the latter date the lessor will consider him a tenant from month to month at a specified increased monthly rental, was sufficient in form, under sec. 2187, Stats., to put an end to the tenancy from year to year.
3. Where the tenant, without making any response to such notice, continued to occupy the premises and paid rent at the increased rate, a new tenancy from month to month was created upon the terms of the notice.
4. A letter from the lessor to the lessee, written in July following, stating that it had an offer to lease the property for a term of ten years from May 1st of the next year, and asking the intentions of the lessee as to occupying the same after that date, to which the lessee replied that it expected to occupy its new quarters by that date, did not modify the terms of the notice above mentioned nor create a tenancy to said May 1st.
5. Within the meaning of the act creating the civil court of Milwaukee county (ch. 549, Laws of 1909), the "manifest prejudicial error" which will justify the circuit court in reversing the

judgment of the civil court and ordering a new trial in the circuit court, is such error as warrants the supreme court on appeal in reversing the circuit court; and the findings of fact by the civil court should not be set aside unless they are against the clear preponderance of the evidence.

APPEAL from an order of the circuit court for Milwaukee county: ORREN T. WILLIAMS, Circuit Judge. *Reversed.*

Action for unlawful detainer, tried in the civil court of Milwaukee county without a jury, a jury having been waived, where judgment went for the plaintiff, appellant here, and on appeal to the circuit court a new trial was ordered. The appeal here is from the order of the circuit court granting a new trial.

The respondent, *Milwaukee Lithographing Company,* and its predecessors occupied the premises in question, known as 217–219 Third street in the city of Milwaukee, for many years prior to April, 1906. On April 19, 1906, a lease was made to the respondent by the appellant for a term of two years expiring April 30, 1908, signed on behalf of appellant by C. W. Henning, vice-president, and H. J. Stark, secretary. After the expiration of this lease the respondent occupied the premises as tenant from year to year of the appellant at a rental of $275 per month, payable monthly, the yearly tenancy expiring April 30, 1912. On the 25th day of March, 1912, the appellant mailed the following notice to the respondent:

"March 25, 1912.

"*Milwaukee Lithographing Company,*
"217–219 Third St., City.

"Gentlemen: Please take notice that the lease under which you are holding possession of the property known as 217–219 Third street expires on the 30th day of April, 1912, and we shall from and after that date consider you as tenants from month to month at the rate of $300 per month.

"As you are well aware, the rental value of downtown property has been increased considerable, but as stated above we are willing to have you continue as our tenants at the rate mentioned.

"Hoping to hear from you by return mail as to your intentions the coming year, we are,

"Yours very truly,

"PABST BREWING COMPANY,

"Real Estate Department,

"By P. J. M."

This notice was received by the respondent on the 26th day of March, 1912, to which it made no reply, but commenced to pay under it $300 per month rent without dissent, objection, or qualification to the terms stated in such notice. Afterwards all formal steps were taken to entitle appellant to possession and to recover in the unlawful detainer action if respondent was its tenant from month to month from and after May 1, 1912.

Henry W. Stark, attorney, and *James D. Shaw,* of counsel, for the appellant.

J. W. McMillan and *F. F. Groelle,* for the respondent.

KERWIN, J. It is suggested by respondent, though not very strenuously pressed in argument, that the order granting a new trial is not appealable. It is said that the appellant is not aggrieved, because if it has a meritorious cause of action it still has opportunity to substantiate it on a trial in the circuit court.

The right of appeal is statutory, and the question turns on whether sec. 3069, Stats., reaches the present order. Sec. 3069 enumerates the appealable orders, and provides that, when an order of the circuit court grants a new trial, such order may be carried to the supreme court by appeal. It may be said that this statute has reference to orders for new trial in cases where the action was brought in the circuit court originally and not to cases carried there by appeal from the civil court. This statute was in force when the act establishing the civil court was passed. Its terms are general and apply to all orders for new trial made by the circuit court. We see no reason why it does not cover an order for a new

trial made by the circuit court in a case brought there by appeal from the civil court. We think the order is appealable. *Hanna v. C., M. & St. P. R. Co., post,* p. 626, 146 N. W. 878.

The main contention in this court is that there was no monthly tenancy, but on the contrary, when the notice to quit was given, the respondent was holding over as tenant from year to year, or at least until May 1, 1913. It is argued that the notice and service thereof were insufficient. We have set out the notice in the statement of facts. It is brief, but to the point, and we think sufficient under the statute. Sec. 2187, Stats., provides that if a tenant for a year or more shall hold over after the expiration of his term he may, at the election of his landlord, be considered a tenant from year to year upon the terms of the original lease; but that such tenancy may be terminated at the end of any year after the expiration of said term, by either party to said lease, upon giving to the other party thereto a notice in writing, not less than thirty days prior to the date of such expiration, that he elects to terminate such lease at the end of such year.

The respondent, having remained in possession and commenced paying the increased rent according to the terms of the notice, accepted its terms and became a tenant from month to month, unless the terms of the notice were in some way modified. *Williams v. Foss-Armstrong H. Co.* 135 Wis. 280, 115 N. W. 803. Counsel for respondent endeavor to distinguish the instant case from *Williams v. Foss-Armstrong H. Co., supra,* on the ground that the tenancy from month to month mentioned in the notice was modified by evidence which showed a holding over for a year from May 1, 1912. The civil court, however, held to the contrary, and such holding is supported by the evidence.

The main evidence relied upon by respondent under this head is an alleged conversation testified to by Mr. Davis, president of respondent, which he claimed he had on March 26,

1912, with Mr. Stark, an officer of appellant, and two letters, one dated July 26 and the other July 30, 1912. The alleged conversation Mr. Stark testified never occurred, and the civil court held that the preponderance of the evidence showed that it did not occur. The two letters, the civil court held, did not change the situation created by the notice and payment of rent under it.

Counsel for respondent insists that the notice of March 25, 1912, was not sufficient under sec. 2187, Stats. In this we think counsel is mistaken. It plainly notified respondent that the lease expired on April 30, 1912, and that any holding thereafter would be from month to month at $300 per month. This, when accepted, was sufficient to create a new tenancy on the terms of the notice.

It is also argued that the letters of July 26th and July 30th, before referred to, amounted to an offer and acceptance of a tenancy to May 1, 1913. The civil court was well warranted in finding that these letters did not establish such a contract, or modify the terms of the tenancy created by the notice of March 25, 1912, and payment of rent under it. The letter of July 26th was written by appellant to respondent informing it that appellant had an offer to lease the property in question for a term of ten years from May 1, 1913, and stating that before making any arrangements it wished to be advised of the intentions of the respondent as to occupying the premises after May 1, 1913. The respondent replied by the letter of July 30th, saying very briefly that it expected to occupy its new quarters by May following. There is nothing in these letters which modifies the terms of the notice of March 25th. On the contrary, such correspondence is consistent with a monthly tenancy and offer by appellant to negotiate for another lease.

But it is argued by respondent that the evidence offered by it was received for a limited purpose, therefore its rights were prejudiced. We do not so understand the record. We think

that the evidence was received and considered by the civil court for the purpose for which it was offered, and that, considering all the evidence offered in its broadest scope, the civil court was justified in its findings and conclusions.

The circuit court reversed the judgment of the civil court and ordered a new trial upon the ground that the respondent did not have a fair trial in the civil court; that there was manifest prejudicial error in the record of the proceedings in the civil court; and that substantial justice cannot otherwise be done. The statute creating the civil court, ch. 549, Laws of 1909, as amended by ch. 425, Laws of 1911, and ch. 320, Laws of 1913, sec. 28, sub. 3, provides, in substance, that on appeal from the civil to the circuit court every judgment of the civil court shall be affirmed or modified and affirmed as so modified, unless, by reason of manifest prejudicial error in the trial of the action in which such judgment was rendered, any party thereto has not had a fair trial in the civil court; but in any such case of mistrial, where substantial justice cannot otherwise be done and the rights of the parties otherwise protected, the judgment of the civil court shall be reversed, and the action ordered tried in the circuit court. Point is made that the law was changed pending the appeal in this case by ch. 320, Laws of 1913. It will be seen, however, that the provision allowing a new trial on account of manifest prejudicial error has not been changed, and no change was made by the amendment of 1913 affecting the questions before us on this appeal.

We are convinced that manifest prejudicial error within the meaning of the statute is such error as warrants this court in reversing the circuit court, and that with reference to reversal by the circuit court of judgments of the civil court the same rule which obtains in this court on reversal of circuit court judgments on appeal to this court also obtains; and that a new trial shall be ordered by the circuit court only in cases where substantial justice cannot otherwise be done and the rights of the parties otherwise protected, in which case the

judgment of the civil court shall be reversed and the action ordered tried in the circuit court. *Eder v. Grifka,* 149 Wis. 606, 136 N. W. 154; *Hanna v. C., M. & St. P. R. Co., post,* p. 626, 146 N. W. 878. In the case at bar, therefore, the court erred in setting aside the findings of the civil court for the reason that such findings were not against the clear preponderance of the evidence. The findings of fact of the civil court, incorporated in its decision, must be regarded as findings of fact here. *Duncan v. Duncan,* 111 Wis. 75, 86 N. W. 562; *Hubbard v. Ferry,* 141 Wis. 17, 123 N. W. 142; *Clausing v. Jacobs,* 147 Wis. 438, 133 N. W. 582. It follows that the order appealed from must be reversed.

By the Court.—The order of the court below reversing the judgment of the civil court and granting a new trial is reversed, and the cause remanded with directions to affirm the judgment of the civil court.

McCABE, Administratrix, Respondent, vs. MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Appellant.

March 20—April 9, 1914.

Street railways: Killing of person at street crossing: Wilful misconduct of motorman: Direction of verdict.

In an action for the death of a pedestrian who, while attempting to cross the street, stepped immediately in front of a street car and was struck thereby, it is *held,* contrary to findings by the jury, that there was no evidence of gross negligence or wilful misconduct on the part of the motorman and that defendant was entitled to a directed verdict.

APPEAL from a judgment of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Reversed.*

On November 25, 1911, at about 9:30 o'clock in the evening, John W. McCabe, then forty-eight years of age, was

struck and killed by one of the defendant's north-bound cars at the intersection of Third and Wright streets in the city of Milwaukee. The plaintiff bases her right of action upon the wilful misconduct of the defendant's motorman in charge of said car. The jury returned the following verdict:

"(1) While nearing and before reaching the point of collision, did it appear to the motorman that the deceased was unconscious of the approach of the car, and that in the absence of effort on his (the motorman's) part a collision of his car with the deceased was inevitable? *A.* Yes.

"(2) If you answer the first question 'Yes,' then answer: Did the motorman, when the peril of the deceased became apparent to him, intentionally refrain from making any effort in good faith to slacken the speed of the car? *A.* Yes.

"(3) Was the death of the deceased caused by wanton and wilful conduct of the motorman indicating conscious disregard of the safety of others? *A.* Yes.

"(4) If you answer either or both of questions 2 or 3 'Yes,' then answer: Was such conduct the proximate cause of the death of the deceased? *A.* Yes.

"(5) What sum will reasonably compensate the widow of the deceased for the loss sustained in consequence of his death? *A.* $7,000."

Motion for directed verdict was made and denied; also the usual motions after verdict were made and denied, and judgment was rendered for the plaintiff on the verdict, from which this appeal was taken.

For the appellant there was a brief by *Van Dyke, Rosecrantz, Shaw & Van Dyke,* and oral argument by *J. D. Shaw.*

For the respondent there was a brief by *Schmitz, Wild & Gross,* and oral argument by *A. J. Schmitz* and *E. J. Gross.*

KERWIN, J. The only question which requires consideration on this appeal is whether the defendant's motorman was guilty of gross negligence. Only two witnesses, Krueger and Steindler, testified as to the accident, and they were produced by the plaintiff.

The charge of wilful misconduct set up in the complaint is

in substance that the deceased proceeded to cross Third street from the east to the west at or near the north crossing of Third street where said street is intersected by Wright street; that at said time a north-bound Third-street car was approaching from the south; that deceased, calculating reasonably from the standpoint of a person of ordinary intelligence circumstanced as deceased, and believing that he had sufficient time, proceeded reasonably to clear the track without interfering with the movement of the approaching car to and past the point where he desired to cross, and assuming that the car was moving at a lawful rate of speed and believing that he had ample time to safely cross said north-bound track before the car would reach him, proceeded to cross from east to west; that when at a point at or near the north crossing between the rails of the north-bound track, the north-bound car, going at an unlawful rate of speed, without lessening its speed as it approached the corner or crossing where deceased was about to cross, without signal of its approach ran upon deceased; that as a result thereof he was instantly killed.

It is established by the evidence that at the time of the accident the car which struck deceased was going at the rate of thirteen miles an hour on the east track on Third street, there being two tracks on the street; that Third street is between forty-eight and fifty feet wide and Wright street about thirty-two feet wide; that Third street runs north and south and Wright street east and west; that there was a center electric light burning in the street at or near the point of accident, and the car which struck deceased was well lighted and the gong rung before the car reached Wright street; that deceased was on his way home, in good health, his hearing and eyesight normal; that he was familiar with the place and situation, having lived near by for about two years; that there were no teams on the street at the time, but many pedestrians were on the street, and the gong rung before the car entered Wright street could be distinctly heard and the lights on the car seen.

posed no duties on the plaintiff to repair and keep clean and tenantable the hallway. From these conditions of the lease it is manifest that the hallway was no part of the premises leased and that the defendant retained possession thereof. In the light of the relationship of the parties as established by the lease, under which the defendant expressly undertook to provide this hall for the tenants occupying the leased portions of the premises for ingress and egress, it is manifest that it was the defendant's duty to maintain the hall in a reasonably safe condition for such use by his tenants. The facts as found by the trial court show that the defendant failed to perform this duty and that his failure to do so caused the radiator to tip over and fall on the decedent, producing his death. As this court declared in referring to the case of *Looney v. McLean,* 129 Mass. 33, "the landlord was held liable to his tenant for negligence upon the same principle that he would have been to a stranger for inducing a tenant to use a portion of the building which he undertook to keep in order, knowing that it was unsafe." True, it is not found that the defendant had actual knowledge that this radiator was insecurely fastened to the wall, but the trial court found on ample evidence that the defendant in the exercise of ordinary care ought to have discovered this danger and ought to have repaired it before the time of this accident, and that he ought to have foreseen that his neglect in this respect might cause an injury to persons lawfully using this hall. Under the facts established and found by the trial court the defendant was guilty of actionable negligence, and the judgment awarded by the trial court is sustained by the record. It follows that the circuit court erred in reversing the judgment of the civil court. For precedents showing upon what grounds the circuit court can reverse a judgment of the civil court of Milwaukee county, see *Pabst B. Co. v. Milwaukee L. Co., post,* p. 615, 146 N. W. 879, and *Hanna v. C., M. & St. P. R. Co., post,* p. 626, 146 N. W. 878.

By the Court.—The judgment appealed from is reversed, and the cause remanded to the circuit court with direction to enter judgment affirming the judgment entered by the civil court, and for costs.

PABST BREWING COMPANY, Appellant, vs. MILWAUKEE LITHOGRAPHING COMPANY, Respondent.

March 19—April 9, 1914.

Appealable orders: Appeal from Milwaukee civil court: New trial, when to be ordered: "Manifest prejudicial error:" Landlord and tenant: Notice terminating tenancy from year to year: Form and sufficiency: New tenancy from month to month: Evidence.

1. The provision of sec. 3069, Stats., authorizing an appeal from an order of the circuit court granting a new trial, applies to such an order made by the circuit court for Milwaukee county in a case brought there by appeal from the civil court.
2. A notice in writing to a tenant from year to year, given on March 26th, to the effect that his lease expires on April 30th (the end of the rental year) and that from and after the latter date the lessor will consider him a tenant from month to month at a specified increased monthly rental, was sufficient in form, under sec. 2187, Stats., to put an end to the tenancy from year to year.
3. Where the tenant, without making any response to such notice, continued to occupy the premises and paid rent at the increased rate, a new tenancy from month to month was created upon the terms of the notice.
4. A letter from the lessor to the lessee, written in July following, stating that it had an offer to lease the property for a term of ten years from May 1st of the next year, and asking the intentions of the lessee as to occupying the same after that date, to which the lessee replied that it expected to occupy its new quarters by that date, did not modify the terms of the notice above mentioned nor create a tenancy to said May 1st.
5. Within the meaning of the act creating the civil court of Milwaukee county (ch. 549, Laws of 1909), the "manifest prejudicial error" which will justify the circuit court in reversing the

him of any danger to the deceased. There was nothing in the appearance of deceased that would cause the motorman to suspect that he would fail to use the ordinary precautions and keep out of the path of danger. There is no evidence that the motorman either saw the deceased or knew that he would enter upon the track prior to the instant when he stepped immediately in front of the car. There is no evidence whatever of any wilful misconduct on the part of the motorman.

There is no evidence to support the first, second, or third findings of the jury. Upon the undisputed evidence, therefore, the defendant was entitled to a directed verdict. *Fox v. C., St. P., M. & O. R. Co.* 147 Wis. 310, 133 N. W. 19; *Stafford v. Chippewa Valley E. R. Co.* 110 Wis. 331, 85 N. W. 1036; *Watermolen v. Fox River E. R. & P. Co.* 110 Wis. 153, 85 N. W. 663; *Bolin v. C., St. P., M. & O. R. Co.* 108 Wis. 333, 84 N. W. 446.

By the Court.—The judgment is reversed, and the cause remanded with directions to dismiss the complaint.

HANNA, Appellant, vs. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY and another, Respondents.

March 20—April 9, 1914.

Appealable orders: Appeal from Milwaukee civil court: New trial, when to be granted: Excessive damages: Reduction: Option to take smaller sum.

1. An order of the circuit court reversing a judgment of the Milwaukee civil court and granting a new trial in the circuit court is appealable under sec. 3069, Stats.
2. Under ch. 320, Laws of 1913, the circuit court can reverse a judgment of the civil court upon appeal and grant a new trial in the circuit court only when by reason of "manifest prejudicial error, . . . any party thereto has not had a fair trial thereof in the civil court," and then only "where substantial justice cannot otherwise be done and the rights of the parties other-

wise preserved and protected." It was error, therefore, to grant a new trial absolutely on the ground of excessive damages.

3. Where damages allowed in the civil court are manifestly excessive, the circuit court upon appeal may, if they were allowed by the civil judge, reduce the amount of the recovery, or, if the excessive allowance was by a jury in the civil court, may make an alternative order giving respondent an option to avoid a new trial by accepting a smaller sum.

APPEAL from an order of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Reversed.*

The appeal is from an order granting a new trial in a case appealed to the circuit court from the civil court of Milwaukee county.

For the appellant there was a brief by *Glicksman, Gold & Corrigan* and *Henry Mahoney,* and oral argument by *W. D. Corrigan.*

For the respondents there was a brief by *C. H. Van Alstine, H. J. Killilea,* and *R. M. Trump,* and oral argument by *Mr. Trump.*

TIMLIN, J. Sec. 3069, Stats., provides that an order made by the circuit court granting a new trial may be carried by appeal to the supreme court. This provision long antedates the establishment of the civil court in Milwaukee, and no doubt originally applied only to orders made by the circuit court in cases tried by that court.

By ch. 549, Laws of 1909, the civil court of Milwaukee county is established with powers and jurisdiction therein specified. Provision is made in sub. 1 of sec. 28 of that chapter for an appeal to the circuit court for Milwaukee county from any final judgment of said civil court or from any order of the civil court from which an appeal to the supreme court might be taken if such order were made by a circuit court. We are unable to limit the scope of these words found in sec. 3069 merely on the ground that this statute existed before

the civil court was established and before the circuit court was given the power in this case exercised. We must hold the order appealable; although a case is presented where the legislature might properly cut off an appeal and allow a review on appeal from the final judgment only.

Ch. 320, Laws of 1913, following sec. 28, ch. 549, Laws of 1909, provides that every judgment of the civil court shall be affirmed or modified and affirmed as so modified by the circuit court upon appeal, unless, by reason of manifest prejudicial error in the trial of the action in which such judgment was rendered, any party thereto has not had a fair trial thereof in the civil court; but in any such case of mistrial, where substantial justice cannot otherwise be done and the rights of the parties otherwise preserved and protected, the judgment of the civil court therein shall be reversed, and the circuit court shall order the action tried in said circuit court in the same manner as if originally brought there, except, etc.

It is quite apparent that reversing a judgment of the civil court and ordering a new trial absolutely on the ground of excessive damages is in violation of this express statute. For the judgment is not to be reversed and a new trial ordered even when the grave errors described in this statute have occurred, except when substantial justice cannot otherwise be done and the rights of the parties cannot otherwise be preserved. But in all cases of excessive allowance of damages by the civil judge, the circuit judge, if warranted by the evidence, may reduce the amount of recovery, and in all cases of excessive allowance of damages by a jury in the civil court the circuit court may make the alternative order described in *Rueping v. C. & N. W. R. Co.* 123 Wis. 319, 101 N. W. 710; *Heimlich v. Tabor,* 123 Wis. 565, 102 N. W. 10; *Beach v. Bird & W. L. Co.* 135 Wis. 550, 116 N. W. 245; *Secard v. Rhinelander L. Co.* 147 Wis. 614, 133 N. W. 45.

This might end the case and is also a valuable right of the respondent in that court, giving him the option of ending the litigation then and there, and it obviates the necessity of a

new trial in case the order is accepted by either party. Therefore, by following the cases above cited substantial justice may be done without compelling a new trial, consequently the circuit court is to follow this course. The order here appealed from was therefore in violation of statute and must be reversed. In all cases where the amount of damages awarded by the judge of the civil court is up for review in the circuit court, the circuit court is not to disturb the award unless there is manifest error. If the circuit court has acted thereon, this court will sustain the ruling of the circuit court whenever that can be done upon the evidence. There seems to be an opinion prevalent that the statute in question enlarges the power of the circuit court to reverse judgments of the civil court on appeal. We understand the statute restricts such power in a considerable degree. That is, not only must there be error discovered, but that error must be manifest—that is, clearly apparent,—it must also be prejudicial to the party appealing, and it must also have deprived him of a fair trial. Even then such error is to be corrected in some other way than by granting a new trial except in those cases in which substantial justice cannot otherwise be accomplished.

By the Court.—Order reversed, and the cause remanded for further proceedings according to law.

SEIFERT, Respondent, vs. MUELLER, Appellant.

March 20—April 9, 1914.

Statute of frauds: Oral contract to convey land: Real-estate brokers: Services under void contract: **Quantum meruit.**

An oral contract to pay for the services of a broker by the conveyance of real estate to him is void under the statute of frauds (sec. 2304, Stats.), and for services rendered under such contract he may recover *quantum meruit*.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

For the appellant the cause was submitted on the brief of *Gilbertson, Lehr, Reitman & Kiefer,* attorneys, and *Lehr, Kiefer & Reitman* and *J. Elmer Lehr,* of counsel.

For the respondent there was a brief by *Max J. Leutermann* and *F. P. Hopkins,* and oral argument by *Mr. Hopkins.*

BARNES, J. This action was brought to recover a commission on the exchange of real estate. The plaintiff claimed to have been employed to make the sale or exchange by one Richter, the agent of the defendant. The plaintiff recovered and defendant appeals. The defendant urges in this court (1) that Richter had no authority to employ plaintiff in her behalf, and (2) that plaintiff agreed to accept and receive as his compensation a lot in the city of Racine. Richter and one Coogan testified that such was the agreement and that a deed was duly tendered in pursuance thereof. Plaintiff denied making such an agreement. The trial court did not pass upon this conflict in testimony, but held that the contract, if made, was void under the statute of frauds (sec. 2304, Stats.), and allowed a recovery on *quantum meruit* for the value of the services performed.

1. The pleadings settle the first question raised. The complaint alleged that the defendant, by her agent Richter, "placed with plaintiff . . . for plaintiff to sell or exchange for her for other property, a farm" in Waukesha county, etc. This averment was admitted in the answer. It was shown without dispute that plaintiff did procure an exchange of defendant's farm for other property.

2. Under the decision in *Koch v. Williams,* 82 Wis. 186, 52 N. W. 257, the parol agreement to pay for the service rendered by conveying real estate was void and plaintiff was entitled to recover the reasonable value of his service.

By the Court.—Judgment affirmed.

STATE EX REL. ILSLEY and another, Executrices, Appellants, vs. LEUCH, City Clerk, Respondent.

March 20—April 9, 1914.

Taxation: Assessment of property omitted in previous years: Change of domicile: Board of review: Jurisdiction: Findings, when conclusive.

1. A finding by the board of review, in making assessments (under sec. 1059, Stats.) of property omitted in previous years, that the owner was a resident of the taxing district, being a finding going to the jurisdiction of the board, is not conclusive on review and cannot be sustained unless it has substantial basis in the evidence.
2. Upon the undisputed facts in this case it is *held* that personal property claimed to have been omitted from assessment in the city of Milwaukee was not taxable there, the owner having theretofore changed his domicile from the city to the town of Milwaukee. The mere facts that he continued to have a business office in the city and that he moved into the city temporarily in the winter, he being about seventy years old, were not inconsistent with an unmistakable effectuated intent to establish his residence in the town.

APPEAL from a judgment of the circuit court for Milwaukee county: F. C. ESCHWEILER, Circuit Judge. *Reversed.*

The appeal is from a judgment affirming, on *certiorari*, assessments made by the board of review of the city of Milwaukee against relators as executrices of the will of Edward Bradley, deceased, for property omitted from taxation in said city in the years 1910 and 1911, during the lifetime of the testator.

It appears from the evidence taken before the board of review that Mr. Bradley was domiciled in the city of Milwaukee from 1874 to May, 1909, when he moved to his country residence in the town of Milwaukee. He continued to occupy a business office in the city jointly with his brother. In 1903 he sold his expensive city residence and built one in the country, costing $35,000. This burned down before it was

ready for occupancy, and in 1908 he began building another, suitable for living in the whole year. In May, 1909, he moved into it and resided there till December 31, 1909, when he went to Washington and other places, spending part of the time at the Hotel Pfister in Milwaukee. From May 1, 1910, to December 31, 1910, he lived at his country home. He then went to California and other parts for the winter, stopping occasionally for a few days at a time at the Hotel Pfister in Milwaukee. About May 1, 1911, he returned to his country home and lived there till February 1, 1912, when he moved to the city on account of the bad roads. He rented flats in his own name and lived there with his daughter, *Mrs. Ilsley,* until about June 1, 1912, when he returned to his country residence. The reason he did not return earlier in the spring was because of the installation of a sewerage system at his country home, which system was not completed till then. He continued to live at his residence in the town of Milwaukee till December 1, 1912, when he returned to his rented flats in the city, where he continued to remain until his unexpected death on the 26th of the same month. So far as known, it was his intention to return to his country residence in the spring of 1913. He made frequent and continuing declarations that his residence was in the town of Milwaukee after he moved there in May, 1909. Indeed, one of his avowed objects in changing his residence from the city to the town was to escape taxation in the city, as he thought he was discriminated against on his intangible property assessment. In May, 1910, he informed the city assessor that he was no longer a resident of the city, and he paid no more personal property taxes there except on office furniture owned jointly with his brother. He was assessed in the town of Milwaukee after 1910 on personal property other than intangible property, which the assessor of the town said was never assessed therein. His name was taken off from the voting lists in the city of Milwaukee on and after the fall of 1910. That

fall he offered to vote in the town of Milwaukee, but as his name was not on the lists he had to be sworn in. He found one qualified witness, went to look for another but did not return. In the fall of 1912 he voted in the town of Milwaukee at the primary and general election, but did not vote at the spring elections of 1911 and 1912. In his income tax statement made out in 1912 for the income of 1911 he gave the town of Milwaukee as his residence. His wife died in 1897 and he never remarried. His daughter *Mrs. Ilsley* occupied the rented flats with him in the city and lived with him part of the time at his country home.

The board of review, apparently largely upon the advice of the city attorney, refused to cancel the assessment by a vote of nineteen to ten. The assessment for 1910 was $1,069,600 and for 1911 was $1,143,800. The executrices are residents of different taxing districts in this state, and neither resides in the city of Milwaukee.

For the appellants there were briefs by *Van Dyke, Rosecrantz, Shaw & Van Dyke,* and oral argument by *G. H. Van Dyke* and *Douglas Van Dyke.*

For the respondent there was a brief by *Daniel W. Hoan,* city attorney, and *Garfield S. Canright,* assistant city attorney, and oral argument by *Mr. Canright.*

VINJE, J. Assuming that the facts in this case bring the relators within the rule announced in *State ex rel. J. S. Stearns L. Co. v. Fisher,* 124 Wis. 271, 102 N. W. 566, that the assessment was presumptively correct and could be overturned only by definite and conclusive evidence impeaching it, yet we cannot escape the conclusion that there was no basis in the evidence upon which the assessment could rest. The finding attacked is one that goes to the jurisdiction of the board of review to act at all, not one confessedly made within its jurisdiction. The former finding stands upon a different basis from the latter, as was pointed out in *Borgnis v. Falk Co.*

147 Wis. 327, 359, 360, 361, 133 N. W. 209. It is not conclusive upon appeal. If it were, such boards could determine their own jurisdiction without the right of review by the courts, no matter how erroneous their action. It is only findings made within their jurisdiction that are conclusive if based upon some evidence, not findings determining jurisdiction. The latter must have a substantial basis in the evidence or they cannot be sustained.

In the instant case the trial court was of the opinion that the renting of flats by the deceased in February, 1912, living in them till the following June, and returning thereto in December, furnished a sufficient basis for the board's determination. In this the court erred. The renting of and living in such flats, as stated, in no wise contradicted the undisputed facts that the deceased intended to change his place of residence from the city of Milwaukee to the town of Milwaukee, and that such intention was effectuated by an actual removal of residence to the town in May, 1909, which continued uninterrupted till his death in December, 1912. His name was taken from the tax rolls in the city and placed upon the tax rolls of the town for personal property taxation. He voted in the town and ceased to vote in the city. In fact, he did everything that could, under his mode of life and business necessities, be done to effectuate his intent to change domicile.

The fact of a man having a residence in one taxing district and a business office in another is now so common as not to cast any doubt upon the question of residence. The same is almost true of the custom of residents of the country, who have a business office in the city, to move into the city temporarily for the winter months. Certainly in the case of the deceased, who was about seventy years old, such temporary winter residence in the city should not be held inconsistent with an unmistakable effectuated intent to establish his residence in the town of Milwaukee.

The question was suggested by respondent that the deceased should not be aided by the court in escaping just taxation.

The court can neither give nor refuse such aid. All it can do is to declare the law upon the facts presented. It appears in this case, however, that the chairman of the town of Milwaukee was present with his attorney before the board of review of the city and protested against the assessment of the estate in the city, claiming it was taxable in the town of Milwaukee. Thus it becomes a question of which taxing district is entitled to tax the estate, rather than a question of its escaping taxation.

The conclusion arrived at on the merits renders it unnecessary to determine the questions raised by the relators as to the constitutionality of the reassessment statute.

By the Court.—Judgment reversed, and cause remanded with directions to enter a judgment canceling the assessments.

GRANT, Respondent, vs. CITY OF MILWAUKEE and others, Appellants.

March 21—April 9, 1914.

Municipal corporations: Sale of "old garbage plant:" What included: Validity of sale: Razing of old building not a "public work or improvement."

1. A city advertised for sale its "old garbage plant," "the entire building, including all its machinery, boilers, etc." Plaintiff purchased and by written contract the city sold to him "the said old garbage plant . . . including the building and machinery therein, switchboard and engines appurtenant and belonging thereto and being a part thereof." A finding of the civil court that two certain steam engines, two generators, and a switchboard, though located in a separate building, were a part of the "old garbage plant" and became plaintiff's property, is *held* to be based on sufficient evidence.
2. The razing or wrecking of the plant and removal of the machinery and material, which plaintiff agreed to do, was a necessary incident to the sale, and not a "public work or improvement" for which plans and other formal steps were required, as conditions precedent, by the city charter.

APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Affirmed.*

Action of replevin brought against the city and its officers to recover two forty-five horse power engines, two generators, and a switchboard. Judgment for the plaintiff was rendered in the civil court, which was affirmed in the circuit court, and the defendants appealed. The property originally belonged to the city, and the question is whether the plaintiff obtained title by reason of certain transactions had by him with the city, acting by its commissioner of public works. The facts were practically without dispute, and were in substance as follows: In and prior to 1901 the city had a sewage pumping station on Jones Island, lighted with oil lamps. In 1901 the city constructed a garbage incineration plant about forty feet distant from the sewage station. In equipping the garbage plant the city purchased the engines, generators, and switchboard in question for the purpose of power to transport boxes of garbage from scows to the plant, as well as light for the plant and power for the pump to wash the boxes. The engines and generators were placed in a lean-to which is part of the sewage station and connected with the garbage building by cables. After they were put in they were used to furnish light to the sewage station and are now so used. The use of the garbage plant was discontinued in 1909. October 28, 1912, a resolution was passed by the common council of the city directing the commissioner of public works to sell or dispose of "the building, machinery and other materials composing the old garbage plant" on Jones Island. Under this resolution the commissioner advertised for proposals for the purchase of "the old garbage plant located on Jones Island; the bid is to be in the aggregate for the entire building, including all its machinery, boilers, etc." Bids were received under this notice ranging from $400 to $1,235, one of which (for $750) was submitted by the plaintiff. The bids not being satisfactory in amount to the commissioner, he rejected all of them and reported his proceedings to the common council and

requested instructions as to whether he should proceed further. January 13, 1913, the council passed the following resolution:

"Whereas, on October 28, 1912, the common council adopted a resolution instructing the commissioner of public works to arrange for the tearing down of the old garbage plant on Jones Island; and

"Whereas, pursuant to said resolution the commissioner of public works advertised for bids for the tearing down and removal of said plant; and

"Whereas, the commissioner of public works has submitted to the common council bids by him received for the razing of said plant, ranging from $400 to $1,235,

"Therefore, be it resolved, by the common council of the city of *Milwaukee,* that the commissioner of public works be, and he is authorized and directed to enter into a contract for the razing of the said plant, which in his judgment shall be for the best interests of the city of *Milwaukee.*"

Thereupon the commissioner published another notice "for the sale of the old garbage plant located on Jones Island," as follows:

"Sealed proposals will be received at this office until Thursday, January 30, 1913, at 10:30 o'clock a. m., for the sale of the old garbage plant located on Jones Island. The bid is to be in the aggregate for the entire building, including all its machinery, boilers, etc., all of said material to be removed from the premises on or before May 1, 1913, and leaving said premises free from all rubbish, material or refuse. All work is to be done to the satisfaction of the commissioner of public works."

In response to this notice the plaintiff submitted a written bid, as follows:

"In response to your 'Official Notice No. 6' hereto attached, we hereby bid for the old garbage plant on Jones Island, including the building and machinery therein, switchboard and engines appurtenant thereto and belonging thereto, and being part thereof, and agree to pay therefor $2,010, within ten days after the acceptance of this bid, provided the bid be accepted within a reasonable time, and agree to wreck the build-

ing and take away the machinery and material on or before the first day of May, 1913, all to the satisfaction of the commissioner of public works."

This bid was accepted by the commissioner and the plaintiff paid the amount thereof to the city treasurer. At about the same time a written contract was entered into between the plaintiff and the city (acting by the commissioner), reciting the notice, the bid and the acceptance thereof, and containing the following clauses:

"Now, therefore, the said city of *Milwaukee,* party of the second part, does hereby sell and assign to the said *R. J. Grant,* party of the first part, the said old garbage plant on Jones Island, including the building and machinery therein, switchboard and engines appurtenant and belonging thereto and being part thereof, and

"Said *R. J. Grant,* party of the first part, covenants and agrees to and with the said city of *Milwaukee,* to wreck said plant and remove and take away the said machinery and material and clean up the wreckage of said plant to the satisfaction of the commissioner of public works of said city, in manner and form as prescribed by said 'Official Notice No. 6,' within ninety days from the date of this contract, that is to say on or before the first day of May, 1913."

The plaintiff proceeded with the wrecking and removal of the plant, but when he came to the engines and generators he was stopped by the commissioner and forbidden to remove them, on the ground that they were not included in his purchase. It seems from the evidence that the plaintiff always understood that the engines, generator, and switchboard were included in the purchase, but that the commissioner did not so understand. The case was tried before the court, and the judge of the civil court who tried the case found that the machinery in controversy was a "part of the old garbage plant on Jones Island."

For the appellants there was a brief by *Daniel W. Hoan,* city attorney, and *E. L. McIntyre,* assistant city attorney, and oral argument by *Mr. McIntyre.*

John T. Kelly, for the respondent.

WINSLOW, C. J. There is really very little that need be said in affirming this judgment. The city advertised for sale "the old garbage plant," "the entire building, including all its machinery, boilers, etc." The trial court found on sufficient evidence that the machinery in question was a part of "the old garbage plant," although located in a separate building. When, therefore, the plaintiff bid for the "old garbage plant" and his bid was accepted and the money paid, he became the owner of the machinery in question.

The claim that the razing of the plant was a public work or improvement, and hence that the sale was void because certain charter provisions were not complied with, requiring that plans of the work be first made and certain other formal steps be taken, cannot be sustained. The razing of the building was in no proper sense a public work or improvement, but simply a necessary incident to the sale of the materials and machinery.

By the Court.—Judgment affirmed.

BERTRAND, Respondent, vs. MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Appellant.

March 21—April 9, 1914.

Street railways: Negligence: Collision with automobile: Contributory negligence of chauffeur.

In an action for injury to an automobile by collision with a street car, the evidence is *held* to show conclusively that the chauffeur, who drove the automobile upon the track from a cross street, was guilty of contributory negligence in failing to avoid the danger after he saw or might have seen the car approaching.

APPEAL from a judgment of the circuit court for Milwaukee county: ORREN T. WILLIAMS, Circuit Judge. *Reversed.*

Action to recover for an alleged negligent injury to plaintiff's automobile.

Plaintiff's machine, while being operated by her employee, was considerably injured by a collision between it and one of defendant's street cars. The occurrence took place in the early part of an evening in September, 1910. The street car, as it approached the point of collision, was a conspicuous object by reason of a headlight thereon and other lights therein. It could easily have been seen by a person circumstanced as the chauffeur was while he was yet a safe distance from the track, wherever it may have been within a distance of 700 feet. The automobile was started from in front of plaintiff's residence on a street, crossing at right angles the one on which the car track was located, about forty feet from the point of intersection and fifty-two feet from the nearest rail of the track. The chauffeur purposed going onto the track street and thence to the right on such street between the street-car track and the curb line of the street, which was about twelve feet from the car track. The car was moving towards the intersection from the direction the chauffeur purposed facing. As he approached the track he swung to the left away from the curb line about sixteen feet. When within about that distance of the first rail, by looking, carefully, he could have seen the car coming anywhere within a distance of more than 500 feet. There was some interference caused by shade trees just inside the curb line. He testified that he looked and did not see any car. When within some three feet of the track he observed the car coming. He was then going at a speed of about four or five miles an hour and could have brought the machine to a stop in a distance of about four feet. The street car was coming toward him pretty fast. There was evidence to the effect that it was moving some over twenty miles per hour. At the instant he saw it he was using the slow speed of his machine and purposed making the turn into the space between the right-hand curb of the street on which the car was coming and the track in such a way as to be within the zone of danger from the car while covering a distance of some forty feet, more or less, and actually on the track for a

distance of some thirty feet. The car, according to his testimony, was then some 80 to 100 feet away. At that instant he changed to second speed and proceeded to make the turn going at a rate of some six miles per hour. Just as the machine was leaving the track the collision occurred. At the time the chauffeur cleared the line of trees the car was some 100 feet away and in plain sight. As the motorman observed there was danger of a collision he slackened his speed materially. The jury, as the court viewed the verdict, found all the issues in favor of the plaintiff and, particularly, that the chauffeur, by making diligent effort to that end, could not have seen the car as he approached the track in time to have avoided the collision and that when the automobile was so located that it might have been stopped by the exercise of ordinary care, it would not have been apparent to a person circumstanced as the chauffeur was that in case of his proceeding, a collision would occur unless the speed of the car was materially reduced.

Judgment was rendered in plaintiff's favor on the verdict.

For the appellant there was a brief by *Van Dyke, Rosecrantz, Shaw & Van Dyke,* and oral argument by *Carl Muskat.*

For the respondent there was a brief by *Kronshage, Hannan & McMillan,* and oral argument by *T. J. Hannan.*

MARSHALL, J. Was the chauffeur guilty of contributory negligence? That is the question for decision. Some light is thrown upon it by the finding that the driver of the automobile, when he was about to enter upon the track, saw the coming car, but continued, nevertheless, and traveled in the zone of danger some twenty-five feet before the collision. It is evident from this finding and the undisputed evidence as well, that from the time he saw, or might have seen, the car, he could have avoided all danger in either of these ways: (a) stopped before entering the track; (b) turned within the space between the curb and the track; (c) speeded up and gone straight across the track; (d) speeded up his machine

after entering upon the track. He did neither but went on his way quite leisurely and without any particular attention to clearing the track for the car to pass, but rather with an air of having as much right to compel the motorman to slow up and give him time, as the motorman had to compel him to speed up or take some other course of not delaying the passing of the street car.

There cannot well be but one conclusion from the foregoing. There could hardly be a plainer case of contributory negligence. It is a rather mild characterization of the chauffeur's conduct to say that he was guilty of ordinary negligence. It has, at least, emphatically that cast. The cause should have been taken from the jury in defendant's favor at the close of the evidence.

By the Court.—The judgment is reversed, and cause remanded with directions to render judgment of no cause of action.

BAGNALL, Respondent, vs. CITY OF MILWAUKEE, Appellant.

March 21—April 9, 1914.

Municipal corporations: Public improvements: Viaducts: Injury to "abutting property:" Damages, how ascertained: Evidence: Instructions to jury: Interest on damages: Reassessment of benefits and damages: Appeal: Harmless errors.

1. Ch. 376, Laws of 1901, which provides that "if any damages shall be sustained by the owners of abutting property" by reason of the construction of a viaduct, "such damages shall be ascertained and determined in the manner provided by law for the determination and assessment of damages for the alteration of the grade of a street," entitles the abutting owners to recover such damages regardless of whether or not the construction of the viaduct effects a change in the established grade of a street.
2. The term "abutting property" in said act includes property abutting on the street upon which the viaduct is constructed, in a case where the structure occupies the street on both sides of the center, although it does not cover the whole street.

3. In the ascertainment of damages under said act all of the provisions of the city charter relating to the assessment of benefits and damages for the alteration of established grades apply.
4. Evidence having been admitted without objection respecting a sale of property in the vicinity of one parcel in question five years after the completion of the viaduct, the refusal of the trial court to strike it out on defendant's motion was not prejudicial error, especially where the jury found no damages as to such parcel.
5. The questions submitted to the jury being the market value of plaintiff's property immediately before the commencement of the viaduct and immediately after its completion, it was not error to refuse to instruct them to eliminate from their consideration depreciation in market value brought about by diversion of traffic by the viaduct.
6. A requested instruction to the effect that the jury should weigh and offset any benefits to plaintiff's property against the damages was not applicable to the questions submitted and was properly refused.
7. A refusal to instruct on loss of profits was proper where the property was vacant and there was no evidence on the subject of profits.
8. There was no prejudicial error in refusing to instruct the jury that they should exclude from consideration any loss or difficulty of access from plaintiff's property to the street or the viaduct therein.
9. Interest on the damages from the time they accrue up to the time of verdict is a proper element of compensation in actions for injuries to property.
10. Following *Filer & Stowell Co. v. Milwaukee*, 146 Wis. 221, and *Pabst B. Co. v. Milwaukee*, 148 Wis. 582, it is *held* that there was no error in refusing to order a reassessment of benefits and damages under the provisions of secs. 1210*d* and 1210*e*, Stats.

APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Affirmed.*

This is one of a series of so-called illegal change-of-grade-viaduct cases growing out of the erection of the Sixth-street First-avenue viaduct in the city of *Milwaukee,* several of which cases have been before this court at various times. *Pabst B. Co. v. Milwaukee,* 148 Wis. 582, 133 N. W. 1112; *Joseph Schlitz B. Co. v. Milwaukee,* 148 Wis. 582, 133 N. W. 1112; *Gross C. Co. v. Milwaukee,* 148 Wis. 72, 134 N. W.

139; *Fred Miller B. Co. v. Milwaukee,* 155 Wis. 81, 143 N. W. 1066.

The appellant classifies the issues involved under three heads: (1) The issue raised by denial of change of grade. (2) That even if the viaduct, constructed as it was like a double deck of a bridge, operated as a change of grade, although the grade of the street was not changed, still there was an issue of liability, because the liability is statutory and depends upon the street having been actually graded to the former established grade, which important fact is denied by the answer. (3) The final issue of the amount of damages, if any.

The jury returned the following verdict:

"(1) What was the reasonable market value of plaintiff's First avenue property immediately before the commencement of the construction of the viaduct in question? *A.* $110.

"(2) What was the reasonable market value of plaintiff's First avenue property immediately after the completion of said viaduct? *A.* $80.

"(3) What was the reasonable market value of plaintiff's East street property immediately before the commencement of the construction of the viaduct in question? *A.* $100.

"(4) What was the reasonable market value of plaintiff's East street property immediately after the completion of said viaduct? *A.* $100."

There were two causes of action set out in the complaint. The property on First avenue, described in the first cause of action, is in block 203 and abuts on the street upon which the viaduct was built. The East street property, described in the second cause of action, is in block 202 and does not abut upon the viaduct street. The jury found no damages to the property on East street which was embraced in the second cause of action.

The appellant assigns various errors involving the issues referred to and some other points raised by rulings on evidence and requests. Judgment was entered upon the verdict in favor of the plaintiff, from which this appeal was taken.

For the appellant there was a brief by *Daniel W. Hoan,* city attorney, and *Clifton Williams,* first assistant city attorney, and oral argument by *Mr. Williams.*

For the respondent there was a brief by *Aarons & Niven* and *Quarles, Spence & Quarles,* attorneys, and *Irving A. Fish,* of counsel, and oral argument by *Mr. C. L. Aarons* and *Mr. Fish.*

KERWIN, J. The appellant contends that there should have been a nonsuit or a verdict directed for defendant, on the ground that no case was made against it. It is claimed that no change of an established grade under the city charter was shown, and that the so-called viaduct law, ch. 376, Laws of 1901, does not authorize the recovery of damages where there is no change of grade, and that the viaduct in question does not change the grade within the meaning of the law.

We shall not consider here whether there was a change of an established grade under the provisions of the city charter and cases cited in the statement of facts, because we are convinced that ch. 376, Laws of 1901, entitles abutting owners to damages occasioned by the construction of the viaduct in question regardless of any change of grade other than the construction of the viaduct.

Sec. 2 of ch. 376, Laws of 1901, reads as follows:

"Whenever the common council of such city shall have determined to erect and construct such a viaduct it shall cause to be made a complete profile plan and detailed specifications for the work, with an estimate of the cost thereof, and as soon thereafter as practicable the city may enter upon the construction of said viaduct, bridges, stairways and approaches in conformity thereto, and all provisions of law relative to public work or improvements in said city, which are not inconsistent with the provisions of this act shall apply to the work hereby authorized, and all official acts incidental thereto. If by the construction of such viaduct in the manner so provided any damages shall be sustained by the owners of abutting property, to the property owned by them, such damage shall be

ascertained and determined in the manner provided by law for the determination and assessment of damages for the alteration of the grade of a street in said city and shall be paid as hereinafter provided."

It will be seen that this statute provides for the assessment of damages in the manner provided for the assessment of damages in case of the alteration of the grade, but it does not make damages dependent upon change of an established grade, provided for in the city charter. *Pabst B. Co. v. Milwaukee,* 148 Wis. 582, 133 N. W. 1112. The construction of a viaduct has a very different effect upon abutting owners than the change of an established grade as ordinarily understood, therefore under the viaduct statute, ch. 376, Laws of 1901, the right to recover damages has not been restricted, but the statute gives the abutting owner the right to recover "any damages" sustained.

Counsel argues that the viaduct does not constitute a change of grade. It is probably not very important whether the viaduct constitutes a change of grade in the ordinary sense of the words, or even under the provisions of the city charter, for the reason that the viaduct statute does not restrict damages in that regard. However this court has ruled that the viaduct in question constituted a change of grade. *Pabst B. Co. v. Milwaukee, supra.* It is argued that the provision as to damages in ch. 376, Laws of 1901, does not apply, because the property in suit is not "abutting" upon the viaduct. Counsel argues that the word "abutting" in the statute means "touching," and cites us to *Hennessy v. Douglas Co.* 99 Wis. 129, 74 N. W. 983; *Northern Pac. R. Co. v. Douglas Co.* 145 Wis. 288, 130 N. W. 246; and *Superior v. L. S. T. & T. R. Co.* 152 Wis. 389, 140 N. W. 26.

In *Northern Pac. R. Co. v. Douglas Co., supra,* it was held that "abutting" the street contemplates the street boundary upon the lot. The main discussion is upon the difference between the words "adjacent" and "abutting" as used in the statute relating to the assessment of special benefits.

In *Superior v. L. S. T. & T. R. Co., supra,* the meaning of the words "adjacent" and "abutting" is considered as used in the statute relating to special assessments for street improvements.

In *Hennessy v. Douglas Co., supra,* this court, in discussing the words "adjacent" and "adjoining," at pages 136 and 137 said: "The distinction between 'adjacent' and 'adjoining' seems to be that the former implies that the two bodies are not widely separated, though they may not actually touch, while 'adjoining' indicates that they are so joined or united that no third body intervenes."

The contention of counsel on this point is that because the viaduct does not occupy the whole street, but leaves a space of some six feet between the side of the structure and the lot line, the property is not abutting property within the meaning of the viaduct statute. In this contention we think counsel is in error. Abutting property manifestly includes property abutting on the street upon which the viaduct is constructed in cases like the present, where the structure occupies the street on both sides of the center although it does not cover the whole street.

While ch. 376, Laws of 1901, gives damages to abutting owners caused by the construction of the viaduct regardless of the city charter provision as to change of grade, it provides that all provisions of law relating to public work or improvements in the city not inconsistent with the provisions of the viaduct statute shall apply to the work of construction of viaducts, therefore the damages caused to abutting lotowners by construction of the viaduct shall be ascertained as prescribed in cases of alteration of street grades, and the provisions of the city charter of the city of *Milwaukee* for assessment of benefits and damages respecting alteration of established grades apply to the instant case. *Pabst B. Co. v. Milwaukee,* 148 Wis. 582, 133 N. W. 1112.

Error is assigned on the admission of evidence respecting a sale of property made in the immediate vicinity of the prop-

erty specified in the second cause of action five years after the completion of the viaduct. The evidence was let in without objection, and afterwards a motion was made to strike it out, which was overruled. Whether this evidence should have been stricken out, we think, rested in the sound discretion of the trial court under all the circumstances of the case. It is quite obvious from the record that the evidence was admitted as touching the value of the property specified in the second cause of action which the jury found was not damaged. We are satisfied that no prejudicial error was committed in refusing to strike it out.

Error is assigned because the court refused to instruct the jury that they should eliminate from their consideration depreciation in market value of the plaintiff's property brought about by diversion of traffic by the viaduct. There was no error in refusing this instruction. The questions submitted were as to market value of the plaintiff's property immediately before the commencement of the construction of the viaduct and immediately after its completion. *Milwaukee T. Co. v. Milwaukee,* 151 Wis. 224, 138 N. W. 707; *Schmidt v. Milwaukee,* 149 Wis. 367, 135 N. W. 883.

Error is assigned because the court refused to instruct the jury as follows:

"In your consideration of questions 2 and 4, I instruct you that you are to include in your deliberation on these questions any benefits that may have been bestowed upon the plaintiff's property by the erection of this viaduct, and that you are to include and offset the said benefits against the damage or depreciation you may find to have been occasioned to the plaintiff's property by the erection of this viaduct, if any; that is, you are to weigh the benefits and the damages the owner sustains, the one against the other."

There was no error in refusing this instruction. It was not applicable to any question submitted and perhaps was properly refused on other grounds which we need not consider.

Error is assigned because the court refused to instruct on loss of profits. There was no error in this refusal. The property was vacant and there was no evidence whatever as to profits.

Error is assigned because of refusal to instruct as to access to the viaduct. We find no prejudicial error in refusing to give this instruction. *Milwaukee T. Co. v. Milwaukee, supra.*

It is also insisted that interest should not have been included in the judgment from January, 1909, about the date of the completion of the viaduct, up to the time of trial. Ordinarily, it is true, interest cannot be allowed upon unliquidated damages. *Tyson v. Milwaukee,* 50 Wis. 78, 5 N. W. 914. It is, however, established by the decisions of this court that interest on damages from the time they accrue up to the time of verdict may be recovered as damages or compensation for the delay occasioned by the defendant's wrong in actions for injuries to property. *J. I. Case P. Works v. Niles & S. Co.* 107 Wis. 9, 82 N. W. 568; *Shaw v. Gilbert,* 111 Wis. 165, 86 N. W. 188; *Darlington v. J. L. Gates L. Co.* 151 Wis. 461, 138 N. W. 72, 139 N. W. 447.

It is also contended that the court should have ordered a reassessment under the provisions of secs. 1210*d* and 1210*e,* Stats. We think this point is ruled against appellant by *Filer & S. Co. v. Milwaukee,* 146 Wis. 221, 131 N. W. 345; *Pabst B. Co. v. Milwaukee,* 148 Wis. 582, 133 N. W. 1112.

In the view we take of the case other assignments of error do not require treatment.

By the Court.—The judgment is affirmed.

FUHRMANN, Respondent, vs. CODDINGTON ENGINEERING COMPANY, Appellant.

March 21—April 9, 1914.

Pleading: Waiver of defects: Negligence of building contractor: Temporary walk in street: Permit from city: Injury to pedestrian: Contributory negligence: Questions for jury: Excessive damages.

1. Where, in an action for personal injuries, defendant assumes that the complaint charges it with actionable negligence, accepts an issue on that basis, and tries it out, it is too late on appeal to challenge the sufficiency of the complaint.
2. Defects in a complaint can only be reached by demurrer, by motion, or by objection made before entering upon the trial to the reception of any evidence under it.
3. No permit from municipal authorities for the temporary use of a street for building purposes can justify the construction or maintenance of a temporary sidewalk in a manner dangerous to pedestrians.
4. Upon evidence tending to show that a temporary walk built in the street by a building contractor was only twenty-five inches wide at the place of accident, that a considerable part of this would be covered by the overhang of a passing street car, and that crushed stone piled on the other side between the walk and curb overflowed upon the walk and at times shoved it over nearer the street-car track, it is *held* that the jury were warranted in finding negligent construction or maintenance of such walk.
5. Whether such negligence was the proximate cause of an injury to the plaintiff who, while using such walk, was struck by a street car coming from behind him, and whether in using the walk he was guilty of contributory negligence, were in this case questions for the jury.
6. Plaintiff, who was seventy-two years of age, had one of his feet crushed almost to a pulp while the other was badly crushed, every bone in it broken, and the muscles torn apart. Three fourths of one foot was afterward amputated and an operation of skin grafting was required. His suffering was great, and he will never be able to walk without crutches. His actual expenses were $1,800, and he received $4,500 from a third party in consideration of a covenant not to sue. *Held*, that an award of $4,500, reduced by the trial court from $6,500, was not excessive.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

This action was brought by the plaintiff against the Milwaukee Electric Railway & Light Company, charging in separate counts negligence and gross negligence of the latter, resulting in personal injury to the plaintiff. The next step in the action was to bring in the appellant as a party defendant. The respondent then settled with the street railway company for $4,500, executing to that company a covenant not to sue and discontinuing the action as to that defendant, also substituting the attorneys for that defendant as attorneys for the plaintiff in the action as it then stood against the appellant alone. Before bringing in the appellant an amended complaint was filed. The appellant answered this complaint and denied that it failed to use ordinary care. It justified placing the temporary sidewalk in the street under an order and permit of the city of Milwaukee lawfully issued to it by the building inspector, it having been at the time engaged in the construction of a building upon the adjacent or abutting property. A special verdict found that a want of ordinary care on the part of the appellant caused respondent's injuries, absolved the respondent from any guilt of negligence on his part, and fixed his damages at $6,500, which were reduced by the court below to $4,500. Error is assigned because the trial court refused to direct a verdict for defendant; also because the damages, although reduced to $4,500 by order of the circuit court, were still excessive, and with reference to rulings upon evidence.

For the appellant there was a brief by *Quarles, Spence & Quarles,* attorneys, and *C. S. Thompson,* of counsel, and oral argument by *Mr. Thompson.*

For the respondent there was a brief by *Van Dyke, Rosecrantz, Shaw & Van Dyke,* and the cause was argued orally by *J. D. Shaw.*

TIMLIN, J. It appears that the appellant considered that the complaint intended to charge it with negligence in respect to the maintenance or construction of the sidewalk in question and accepted an issue on that basis and tried it out, so that we have now no right to reverse in this court for insufficiency of the complaint. We presume the first assignment of error is based on the testimony of Mr. Salzstein, to whose statement that he found broken pieces of stone on the walk where the injured man was sitting an objection was made on the ground that the evidence relating to the condition of the walk was not within the pleadings and was immaterial, etc. It is to be observed that the defendant justified its maintenance of this temporary sidewalk in the street on the ground that it was engaged in the construction of an adjacent building and had received authority from the city to place this temporary sidewalk in the street. It was competent in rebuttal of such claim to show that notwithstanding such permit the temporary sidewalk was unlawful because constructed and maintained in a manner dangerous to pedestrians. No permit can justify such construction and maintenance, and the dangerous character of the construction and maintenance effectually overcame any claim of immunity by reason of the order of the city authorities. This evidence was also competent in rebuttal of the affirmative matter in the answer. Objection to the general sufficiency of the complaint could not be taken in this indirect way. To do so would bring about the anomaly of defendant trying this question on the merits, and if successful having a judgment in bar upon a point which he considered necessarily involved for the purpose of using it as a defense, but irrebuttable because of defects in the complaint. The defects in the complaint could only be reached by demurrer, by motion, or by objection made before entering upon the trial to the reception of any evidence on the ground that the complaint did not state a cause of action.

Taking up the case on the evidence, we discover evidence

from which the jury might have found that the temporary sidewalk, although authorized by the proper officers of the city, was only from two feet to thirty inches in width and between twenty-one and thirty inches from the edge of the nearest rail of the street railway; that the appellant was engaged in hauling fresh stone and dumping it between this sidewalk and the curb, and that as the crushed stone piled up there and the loaded wagons rolled it down it spread at the base and crowded the temporary sidewalk over nearer to the street-car rail, and the defendant's men, on removing the crushed stone, in their operations moved back the sidewalk toward the curb from time to time with crowbars or other levers. Along the side next to the crushed stone of this temporary sidewalk there was a railing; none on the side next the street-car rail. The crushed stone pile between the temporary sidewalk and the curb, when it reached a considerable height, was spread out under this railing and on to the temporary sidewalk, narrowing the already narrow sidewalk and taking up part of the limited space furnished on the side farthest from the street-car rail, while also making the narrow sidewalk more dangerous in the way of causing a fall. So that, in short, there was evidence from which the jury might find that the defendant, although authorized to have a temporary sidewalk here during its construction operations, nevertheless negligently constructed and maintained the same. The jury could well have found that the sidewalk as constructed was too narrow, too near to the street railway track, and not sufficiently fastened or anchored in place, and also that the defendant allowed it to be incumbered on the side farthest from the railway track with crushed stone to such an extent as to tend to crowd the pedestrian nearer to the railway track and to put under his feet an unstable or movable substance which might cause his fall at a critical moment. There is evidence from which the jury could properly have found that the walk itself was so near to the nearest rail of the street railway that it was

partly under the overhang of a passing car. Respondent furnishes the following figures which seem to have support in the evidence:

The distance from the curb to the first rail was thirteen feet seven inches. The railing mentioned on the temporary walk was distant from the curb ten feet six inches. The temporary walk twenty-five inches wide; the overhang of the car was nineteen and one-half inches beyond the outside of the rail. This would leave quite a portion of this temporary sidewalk under the overhang of a passing car. With the pedestrian crowded over toward this portion of the walk by the crushed stone which overflowed upon the other side of the temporary sidewalk, there is quite a basis for the jury's finding of appellant's negligence in the construction and maintenance of the temporary sidewalk. There is also evidence from which the jury might properly find that the plaintiff was not guilty of contributory negligence. The sidewalk was a standing invitation to him to use it. He must use it in common with other pedestrians in the ordinary way, following, preceding, meeting, and passing. He may have failed to observe its dangerous proximity to the street railway or not have known the extent of the overhang of the street car or of the presence of the crushed stone on the narrow sidewalk or that a street car would overtake him at any particular point on this sidewalk, and it is very difficult for a court dealing with law, not facts, to say that he ought in the exercise of ordinary care to have known of the danger and to have avoided it.

The jury having become convinced of the negligence of the appellant in the mentioned particulars, the question whether or not that negligence caused the plaintiff's injury was purely a question of fact.

It is claimed that the damages are excessive. The plaintiff is a man seventy-two years of age, had one of his feet crushed almost to a pulp. Three fourths of his foot was afterward amputated and there was an operation of skin-grafting neces-

sary. The other foot was quite badly crushed, every bone in it broken, and the muscles torn apart. Plaintiff would never be able to walk without crutches; his sufferings were of course great. His total expenses for hospital attendance, surgical treatment, and nursing amounted to $1,800. He received in settlement from the street railway company $4,500. His loss of earning capacity was comparatively small, but his injuries were great, exceedingly painful, and his disability permanent. The finding of the circuit court upon this question of damages must be considered from the viewpoint of the advantages of that court not only in hearing evidence, but also in the matter of observing the conduct of the jury during the trial, the procedure at the trial, and the demeanor of witnesses and the appearance of plaintiff. And great weight must be given to its decision on this question. The learned circuit judge also exercised his judgment in reducing the amount awarded by the jury. We find no sufficient ground for disturbing the verdict in this respect, and the judgment should be affirmed.

By the Court.—It is so ordered.

JANESVILLE WATER COMPANY, Appellant, vs. CITY OF JANESVILLE and others, Respondents.

March 21—April 9, 1914.

Public utilities: Purchase of waterworks by city: Election: Form of question submitted: Notice: Insufficiency: Invalidation of vote.

1. **At an election to determine whether a city should purchase an existing waterworks plant, the fact that the question in form submitted was "Shall the city of Janesville purchase the Janesville Water Company?" did not mislead the voters or invalidate the election.**
2. **Where, under sec. 926—31, Stats. 1911, and the city charter, ten days' notice must be given of an election upon the question of the acquisition of a public utility by the city, but the first**

publication was on Sunday, nine days before the election, the notice was insufficient, even assuming that a publication on Sunday was valid; and such insufficiency in this case invalidated the election, there having been but a small majority in favor of acquiring the utility and it not satisfactorily appearing that the voters had adequate time to investigate, consider, and discuss the subject voted upon.

3. The rule that a vote to fill offices at a general election is not invalidated by insufficient election notice where it appears that the electors, by reason of the existence of general laws, knew of the election and of the offices to be filled in time to enable them to express their choice, does not apply to special elections or to special questions submitted at a general election, there being no presumption that the voters knew of those matters.

APPEAL from an order of the circuit court for Rock county: GEORGE GRIMM, Circuit Judge. *Reversed.*

Plaintiff began a suit in equity to restrain the defendants from prosecuting a proceeding pending before the railroad commission of Wisconsin for the valuation of plaintiff's waterworks under the Public Utility Law of this state and for a purchase by the defendant city of said waterworks. A temporary injunction was secured from a court commissioner, which the circuit court for Rock county dissolved after a hearing before it. This is an appeal by plaintiff from the order dissolving the temporary injunction.

For the appellant there was a brief by *Jeffris, Mouat, Oestreich & Avery,* and oral argument by *M. G. Jeffris* and *O. E. Oestreich.*

W. H. Dougherty, city attorney, for the respondents.

VINJE, J. At the election held in the city of *Janesville* April 2, 1912, there was submitted to the voters, pursuant to directions of the common council, the question: Shall the city of *Janesville* purchase the *Janesville Water Company?* The total number of votes cast upon the subject was 2,279, of which 1,238 were cast for and 1,041 against the question, the majority in favor of purchase being 197.

Claim is made that the question was so worded as to mis-

lead the voters. It is true the question is inapt and does not accurately express the matter intended to be submitted, namely, Shall the city of *Janesville* purchase the plant or waterworks system of the *Janesville Water Company*? but in our judgment no voter was misled by the form of the question. Every voter must have understood that it was the purchase of the plant or physical property of the *Janesville Water Company* that was intended and not the purchase of the corporation mentioned. *Janes v. Racine,* 155 Wis. 1, 143 N. W. 707; *State ex rel. Elliott v. Kelly,* 154 Wis. 482, 143 N. W. 153.

The first official notice that such a question would be submitted to the voters was published on Sunday, March 24th, nine days before the election. It is claimed by plaintiff that the notice was insufficient.

Sec. 1797*m*—80, Stats., inferentially at least, provides that the electors of a municipality may at a general or special election vote upon the question of the acquisition of a public utility. It makes no provision for giving notice of such election. But sec. 926—31, Stats. 1911, provides that when any question is to be submitted to the voters of any city or village the common council of such city or the village board of such village shall issue a call for such election in accordance with the law authorizing such submission. Unless otherwise provided by such law, notice of such election shall be given, and the election shall be held and conducted by the inspectors and clerks of election in the same manner, and the return thereof shall be made in the same form and manner, as in the case of general municipal elections. Since the general Public Utility Law makes no provision for giving notice of election, such notice must, under sec. 926—31, be given as required for a general municipal election in *Janesville.* Sec. 1 of ch. II of the charter of that city [ch. 221, Laws of 1882] requires ten days' notice to be given for a general municipal election therein. So ten days was the notice required for the submission of the question voted upon. Assuming that the first pub-

lication on Sunday was valid, it would still leave the notice insufficient.

The question arises, Does such insufficiency of the election notice invalidate the vote cast? Many cases are called to our attention to the effect that a failure to give the full statutory election notice does not invalidate the election, and among others, *State ex rel. Peacock v. Orvis,* 20 Wis. 235; *State ex rel. Lutfring v. Gœtze,* 22 Wis. 363; and *State ex rel. Chase v. McKinney,* 25 Wis. 416, in which the court held that, as to filling offices at a general election, an insufficiency of the election notice would not invalidate the votes cast where it appeared that the voters had an opportunity to cast their ballots, because the time of holding general elections is fixed by law and it is generally known that offices are to be filled by vote at such elections.

In the last case mentioned the election was declared void because it was not generally known that a vacancy was to be filled. But decisions as to the validity of general elections, especially where challenged by one who participated therein, are of little value in determining the precise question before us. It is undoubtedly the rule in this state, as well as in most states, that a vote to fill offices at general elections is not invalidated by an insufficient election notice where it appears that the electors, by reason of the existence of general laws, knew of the election and of the offices to be filled in time to enable them to express their choice. Such a rule cannot be applied to special elections or to special questions submitted at a general election, for there is no presumption that the voters knew anything about either, there being no general law to apprise them of the fact.

Moreover, so far as the question here considered is concerned, it is not enough to show that the electors knew that a vote was to be taken upon it in time to go to the polls and cast their ballots. The question, in order to be voted upon intelligently and understandingly, required the collection and consideration of many important data and facts concerning the

advisability of the city owning and running such a public utility as was contemplated to be purchased. The required statutory notice of ten days was given not only for the purpose of enabling voters to go to the polls on election day, but also to apprise them of the question to be voted upon in time to permit them to make such inquiries and investigations upon the subject as they might desire, as well as time for consideration and discussion thereof. An intelligent vote upon this question requires a more or less general knowledge of facts usually not well known, relating not only to the rates charged but to the cost of giving the service, as well as a consideration of the probability of the municipality managing such a plant so as to give cheaper or better service than the private concern would under the supervision of the railroad commission. The statute permits ten days. Can the court shorten the period? If so, can it say the voters of *Janesville* did not require ten days for a consideration of the matter, and were not entitled to a ten days' campaign upon the subject? To do so would be to substitute our judgment for the legislative judgment as to the length of notice that should be given. There can be here no room for construction. The requirement of a ten days' notice is plain and unambiguous and capable of exact measurement. When the facts are known, no judgment or discretion need be applied in order to ascertain whether or not the exact statutory requirement has been complied with. So the case could be rested upon the plain language of the statute, as was done in the case of *Hubbard v. Williamstown,* 61 Wis. 397, 21 N. W. 295, where it was held that a fourteen-day notice of a special town meeting invalidated the proceedings thereof, the statute requiring a fifteen-day notice. We prefer, however, to rest it upon the ground that in our judgment, under the facts in the case, the statutory purpose of giving notice has not been met. It does not satisfactorily appear that the voters had adequate time in which to consider and discuss the subject voted upon. Since the first publication was on a Sunday, only eight days after the commence-

ment of a secular day remained for investigation, discussion, and consideration—a substantial shortening of the statutory period. In view of the fact that out of a total vote of 2,279 there was a majority of only 197 in favor of purchase, we cannot say that the result might not have been different had the statutory notice been given—not because the voters did not have an opportunity to vote for lack of timely notice, but because a number sufficient to change the result might have come to a different conclusion had two days more been given the electors in which to consider and discuss the matter.

It is claimed that the discussions in the public press of the city of *Janesville* adequately advised the voters of the fact that the question of the purchase of the waterworks was to be voted upon at the coming spring election. A reference to the exhibits appended to the affidavit of *Mr. Dougherty,* which exhibits purport to give all the items published in the papers of the city respecting this subject, discloses the fact that on October 17, 1911, the Janesville Daily Gazette informed the voters that the council had taken action looking towards submitting the purchase of the waterworks to the voters at a special election to be held for that purpose. On October 31, 1911, the Janesville Daily Gazette contained an item to the effect that the council had the previous evening unanimously passed a resolution directing the city clerk to submit the question of the purchase of the waterworks by the city at the next spring election. On the 18th, 20th, and 21st of October this same paper contained items discussing the advisability or nonadvisability of the city purchasing the waterworks. It also contained similar items on November 9 and 15, 1911, and December 27, 1911. On October 17, 1911, the Janesville Daily Recorder contained an item stating that the purchase by the city of the waterworks would be submitted to the voters at a special election. The exhibits fail to show that either of these two papers, or any others, at any time between December 27, 1911, and March 25, 1912, contained any publication with reference to the question of submitting the pur-

chase of the waterworks to a vote either at a special election or at the spring election. The latter date was after the first official notice had been published and not ten days previous to the time of the election. It is true that from October 17th and running through the remainder of October and the months of November and December, and as late as January 3, 1912, there were contained in both papers a number of items relating to the question of changing to a commission form of government and to the advisability, generally, of municipalities owning public utilities. The article of January 3, 1912, appearing in the Janesville Daily Gazette began: "We hear but little said about municipal ownership of public utilities these days," showing the discussions had about ceased. References are also made in the papers up to January 3, 1912, to discussions held in the Y. M. C. A. rooms and by the Twilight and Union clubs of the city. These items, however, were of a general nature and did not inform the voters that an election would be held on the 2d of April to determine the question submitted. No such information was given to the voters from December 27, 1911, until the publication of the official notice March 24, 1912, and no reference to the subject of the purchase of the waterworks, or of public ownership, or municipal ownership of public utilities, seems to have been contained in either paper from January 3 to March 25, 1912. In view of the fact that some of the newspaper items appearing in the fall of 1911 declared that the question would be submitted at a special election, and some declared that it would be submitted at the coming spring election, and in view of the fact that no definite information relative thereto, so far as we can ascertain from the exhibits on file, was contained in either of these papers after December 27, 1911, it cannot be said that the voters were adequately informed by the public press that the question of the purchase of the waterworks was to be voted upon at the spring election of 1912.

The cases on the subject are far from harmonious, either as relating to special elections or general elections, or to the

submission of special questions at general elections. They all agree in saying that the legislative purpose should be carried out, and when it is, the statute is substantially complied with, although there may be a slight variance from the statutory notice. The difficulty arises in determining when the legislative purpose is met, and different conclusions as to that seem to be drawn by different courts from apparently similar facts.

In the case of *Bauer v. Township Board,* 157 Mich. 395, 122 N. W. 121, much relied upon by respondents, the court held that a failure to give the full statutory notice did not invalidate an election upon the question of prohibition. But it said the electors were as well informed of the time, place, and manner of the election *and of the issue involved* as they would have been if the first publication had been four days earlier. "Probably no issue before the people," it adds, "was ever more fully discussed and more thoroughly understood by the electors." Moreover, it appeared that a majority of all the qualified voters in the county voted in the affirmative. So the case was one where the facts showed that the statutory purpose of notice was fully met and that the result could not have been otherwise. So, also, in the case of *Grove v. Haskell,* 24 Okla. 707, 104 Pac. 56, cited by counsel for respondents as a leading case, the court held that in the absence of a showing that the failure to post or publish notices as required had any effect on the result of the election or deprived any voter of an opportunity to vote, the election would not be declared invalid at the suit of one who participated therein.

By the Court.—Order reversed, and cause remanded for further proceedings according to law.

McDOUGALL, Respondent, vs. RACINE COUNTY and another, imp., Appellants.

March 21—April 9, 1914.

Injunction: Taxpayers' action: Counties: Erection of courthouse: Location: Statutory requirements: Reasonableness: Contracts: Impairing obligation: Breach: Specific performance.

1. The expenditure of county moneys in the erection of a courthouse in violation of law may be enjoined in a taxpayers' action.
2. The question of the proper location of a courthouse is a governmental question, which is solely for the state to decide as it deems best, and that decision is not open to question by the county or the courts.
3. Ch. 746, Laws of 1913 (amending sec. 656, Stats., so as to provide that "in the construction hereafter of any courthouse . . . no outer wall shall be nearer than forty feet to the boundary line of any privately owned contiguous premises," and that the plans shall be accompanied by a certificate of the circuit judge to the effect that he is advised by experts and believes that the court rooms will possess proper acoustical properties), is not invalid as being unreasonable or discriminatory.
4. Where, at the time said act of 1913 took effect, contracts for the erection of a courthouse not complying therewith had already been made, but the work had not been commenced, the statute was applicable and was not invalid on the ground that it impaired the obligations of the contracts.
5. The state may breach its contracts if it will, subject to the payment of damages, without impairing the obligations of contracts, for it is because they are unimpaired that damages may be recovered for their breach.
6. Equity will not enforce the specific performance of such a building contract against private persons, and much less against the public.

TIMLIN, J., dissents.

APPEAL from an order of the circuit court for Racine county: CHESTER A. FOWLER, Judge. *Affirmed.*

Action in equity brought against *Racine County* and certain contractors to obtain a perpetual injunction enjoining the erection of a county courthouse at the city of Racine, for the building of which contracts had already been entered into between the county and the defendant contractors. General de-

murrers to the complaint were overruled, and the defendants appeal.

It appears by the complaint that the county had entered into contracts with the other defendants to build a courthouse upon certain property owned by the county on the west side of Main street in the city of Racine, 120 feet in width from north to south by 140 feet in depth from east to west; that the contiguous property on both north and south is privately owned; that said projected building is to be about eighty feet in width from north to south, thus bringing the north and south walls thereof respectively twenty feet distant from the privately owned property aforesaid; that the county board of supervisors has appropriated $165,000 for the erection of said building and has directed the issuance of county bonds for that sum, which bonds are in the hands of the county treasurer, ready to be negotiated and sold; that the contracts aforesaid were entered into in August, 1912, but that the work thereunder has not been commenced on account of certain litigation involving the legality of the proceedings leading up to the contracts; that on August 4, 1913, ch. 746 of the Laws of Wisconsin for the year 1913 went into effect, which law provides as follows:

"In the construction hereafter of any courthouse the following restrictions and limitations shall be observed:

"(a) No outer wall shall be nearer than forty feet to the boundary line of any privately owned contiguous premises.

"(b) Such construction shall be in accordance with plans and specifications accompanied by the certificate of the judge of the circuit court in whose circuit the building is to be erected, to the effect that after consultation with competent experts he is advised and believes that the court rooms therein provided for will possess proper acoustical properties. The expense of such expert advice shall be paid out of the county treasury upon the certificate of such judge.

"Repairs which amount substantially to the reconstruction of a courthouse shall be governed by the same restrictions and limitations, as far as practicable."

That on or about August 15, 1914, the county delivered

possession of the property to the contractors and that the defendants threaten to tear down the buildings now on the property and erect the new courthouse, and will do so unless restrained by injunction. The plaintiff prays for an injunctional order preventing the construction of said building or the issuance or sale of bonds therefor until the county shall have acquired sufficient of the contiguous property north or south of its own land so as to leave a space of forty feet on the north and south sides respectively of the new building.

William W. Storms, district attorney, for the appellant *Racine County.*

For the appellant *General Construction Company* the cause was submitted on the brief of *Wheeler & Witte.*

Frank M. Hoyt, for the respondent.

WINSLOW, C. J. If the law of 1913 (quoted in the statement of facts) be a valid law, and if it applies to the case in hand, there can be no doubt that the complaint states a good cause of action in equity. In such case the erection of the courthouse as contemplated by the contract would be a violation of law, and it is a well settled principle that the expenditure of corporate money for an unlawful purpose may be enjoined by a taxpayer suing on behalf of himself and all other taxpayers. *Webster v. Douglas Co.* 102 Wis. 181, 77 N. W. 885, 78 N. W. 451. So the legal questions arising are, (1) Is the law a valid law? and (2) Does it apply to the present case? and these questions will be briefly considered.

1. The appellants claim that the law of 1913 is unreasonable and discriminatory, but it is plain that no such claim can prevail because the question of the proper location of a courthouse is a governmental question, which is solely for the state to decide as it deems best, and that decision is not open to question by the county or the courts. In governmental matters the county is simply the arm of the state; the state may direct its action as it deems best and the county cannot complain or refuse to obey. The arm is not to be heard to chal-

lenge the wisdom of the commands of the brain. We see no reason to question the validity of any of the provisions of the law.

2. The law went into effect August 4, 1913, and in terms applies to courthouses "hereafter" erected. As the construction of the Racine courthouse has not yet commenced, it is within the express terms of the law.

It is said that if the law be held to apply to the present case it will impair the obligations of the building contracts. Not so, however. The state may breach its contract if it will, subject to the payment of damages. This is not impairing the obligations of a contract. It is because the obligations of a contract are unimpaired that damages may be recovered for their breach. *Lord v. Thomas,* 64 N. Y. 107; *Danolds v. State,* 89 N. Y. 36; *Chalstran v. Board of Ed.* 244 Ill. 470, 91 N. E. 712. Equity will not enforce the specific performance of a building contract like the present against private persons and much less against the public. 36 Cyc. 581; *Kendall v. Frey,* 74 Wis. 26, 42 N. W. 466. The public interest may demand the breach even at the expense of responding in damages.

By the Court.—Order affirmed.

TIMLIN, J. (*dissenting*). (1) I think ch. 746, Laws of 1913, is invalid as against the appellants who are contractors because it impairs the obligations of their contracts if it applies to their existing contracts as ruled by the majority opinion. *Green v. Biddle,* 8 Wheat. 1.

(2) I do not think a taxpayer is so affected that he can maintain such an action as this, because his taxes are not increased by the determination of the appellants to adhere to the contract entered into prior to the enactment of the statute in question. *Bell v. Platteville,* 71 Wis. 139, 36 N. W. 831; *Linden L. Co. v. Milwaukee E. R. & L. Co.* 107 Wis. 493, 83 N. W. 851.

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1. When a wild animal is brought under the control of a person so that actual possession is practically inevitable, a vested property interest in it accrues which cannot be divested by another's intervening and killing it. *Liesner v. Wanie,* 16

2. Upon the evidence in an action to recover the body of a wolf a verdict for plaintiff was properly directed under the foregoing rule. *Ibid.*

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3. Sec. 1620, Stats., makes allegation and proof of *scienter* unnecessary as well in case of injuries to persons as in case of injuries to cattle by dogs. *Legault v. Malacker,* 507

4. A complaint which alleges that a dog attacked and wounded a person who at the time was where he might lawfully be and in the exercise of ordinary care, is sufficient without alleging that the dog was vicious and mischievous. The law no longer "allows a dog his first bite." *Ibid.*

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1. An order permitting an answer to be amended so as to set up the statute of limitations and also a plea in abatement, is not appealable. *Prochnow v. N. W. Iron Co.* 408

2. An order in such case sustaining the plea in abatement and dismissing the complaint as to one of the plaintiffs is appealable, but an appeal therefrom does not bring up for review the order permitting the answer to be amended. *Ibid.*

3. An order denying a motion to bring in a person who may be a proper but is not a necessary party is not appealable. *Schmuhl v. Milwaukee E. R. & L. Co.* 585

4. An order of the circuit court reversing a judgment of the Milwaukee civil court and granting a new trial in the circuit court is appealable under sec. 3069, Stats. *Hanna v. C., M. & St. P. R. Co.* 626

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When is taken.

6. Where, within the time limited by sec. 3039, Stats., notice of appeal was duly served as provided in sec. 3049 and a copy of the undertaking upon appeal was served on the adverse party, the appeal was "taken," within the meaning of said sec. 3039, although the undertaking was not filed with the clerk of the trial court within said time. *Liesner v. Wanie,* 16

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8. Violations of established rules or methods of procedure become material on appeal only when it is evident that they have impaired a party's right to a fair and impartial trial on the merits. *C. W. Beggs, Sons & Co. v. Estate of Behrend,* 34

9. Under sec. 3072*m*, Stats., error to justify reversal must affirmatively appear to have been prejudicial to the appellant, and this does not appear from the exclusion of evidence, when the court is not advised what was intended to be shown by the witness nor how it would affect the rights of the parties. *Zwietusch v. Luehring,* 96

10. The exclusion of evidence tending to show that gearings in which plaintiff was hurt were so located as to be dangerous to employees in the performance of their duties, is not error of which the plaintiff can complain where the jury found in his favor upon that issue. *Dixon v. Russell,* 161

11. Errors which might have tended to reduce a party's recovery if the jury had found in his favor must be deemed harmless where, under the verdict as found, he was not entitled to any damages. *Toepfer v. Sterr,* 226

12. A judgment will not be reversed because the damages recovered by the appellant were fixed upon a wrong theory, if they are as large as they would have been had they been assessed upon the proper basis. *Kneeland-McLurg L. Co. v. Lillie,* 428

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13. Within the meaning of the act creating the civil court of Milwaukee county (ch. 549, Laws of 1909), the "manifest prejudicial error" which will justify the circuit court in reversing the judgment of the civil court and ordering a new trial in the circuit court, is such error as warrants the supreme court on appeal in reversing the circuit court; and the findings of fact by the civil court should not be set aside unless they are against the clear preponderance of the evidence. *Pabst B. Co. v. Milwaukee L. Co.* 615

14. Under ch. 320, Laws of 1913, the circuit court can reverse a judgment of the civil court upon appeal and grant a new trial in the circuit court only when by reason of "manifest prejudicial error, . . . any party thereto has not had a fair trial thereof in the civil court," and then only "where substantial justice cannot otherwise be done and the rights of the parties otherwise preserved and protected." It was error, therefore, to grant a new trial absolutely on the ground of excessive damages. *Hanna v. C., M. & St. P. R. Co.* 626

15. Where damages allowed in the civil court are manifestly excessive, the circuit court upon appeal may, if they were allowed by the civil judge, reduce the amount of the recovery, or, if the excessive allowance was by a jury in the civil court, may make an alternative order giving respondent an option to avoid a new trial by accepting a smaller sum. *Ibid.*

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16. Where a majority of the members of this court are not in accord as to any ground for reversal, a judgment will be affirmed. *Grogan v. Wis. Sugar Co.* 406

Prior decisions: Law of the case.

17. Prior decisions of this court to the effect that defendant's paving contract with the plaintiff city was vitiated by fraud, and that the judgment in an action to restrain the city from making such contract was binding on defendant, which appeared in such action by counsel, are adhered to upon practically the same record. *Fond du Lac v. Barber A. P. Co.* 471

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18. In an action to recover the value of property which was admittedly lost by a carrier, the amount involved being small, this court, upon reversing a judgment for plaintiff, gives him an option to take judgment for the value placed upon the property by the defendant. *Maas v. C. & N. W. R. Co.* 44

19. The injury in this case having occurred after ch. 485, Laws of 1911, went into effect, and the question whether the defendant had, as required by said act (secs. 2394—41, 2394—48, Stats. 1911), furnished a working place which was as safe as the nature of the work would reasonably permit not having been considered on the trial or passed upon by the jury, the case is remanded for a new trial according to the law applicable thereto. *Szeliwicki v. Connor L. & L. Co.* 286

20. Where, in an action for personal injuries, plaintiff was entitled to judgment upon the verdict as rendered, and the trial court erroneously changed an answer of the special verdict so as to charge him with contributory negligence, the judgment should be reversed upon appeal and the cause remanded with directions to reinstate the answer of the jury and enter the judgment which should be entered. *Hollenbeck v. Chippewa Sugar Co.* 317

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1. Upon traverse of an affidavit for attachment the question of defendant's intent to defraud his creditors is a question of fact. *Germania Nat. Bank v. Lachenmeier*, 573

2. The evidence in this case is *held* to sustain a finding by the trial court to the effect that defendant disposed of certain moneys to his wife with intent to defraud his creditors, and concealed other moneys with like intent. *Ibid.*

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Trust companies: Insolvency: Trusts: Commissioner of banking.

1. A receiver, trustee in bankruptcy, or assignee for creditors does not take title to property held in trust, unless by force of some statute, and the same is true of the commissioner of banking when his duties require him to take charge of a trust company because of insolvency or other cause. *Sullivan v. Kuolt*, 72

2. The purpose for which such commissioner takes charge of a trust company under the statute (sub. 3, sec. 2022, Stats. 1913) is to liquidate its affairs and wind up its business as soon as is consistent with good business management. *Ibid.*

3. To do this it is necessary to settle with *cestuis que trustent*, where such exist, and since the commissioner of banking represents the stockholders and creditors generally some one other than he should act as trustee, although, until the appointment of a new trustee, it is his duty to conserve and protect the trust property as far as possible. *Ibid.*

4. The insolvency of a trust company and the suspension of its business by the intervention of the commissioner of banking and seizure of its effects incapacitated it from continuing to act as trustee, and required that a new trustee be appointed. *Ibid.*

5. No formal action for the appointment of a new trustee is necessary, but the *cestuis que trustent* may apply to the court on notice for such appointment, or the commissioner of banking may himself make the application, and it would become his duty, under the statute, to do so if the *cestuis que trustent* unreasonably delay to make application. *Ibid.*

6. Actions having been brought by *cestuis que trustent* against an insolvent trust company and the commissioner of banking to prevent the latter from administering certain trusts, to remove the trust company as trustee and appoint a successor, the complaints in such actions may be treated as petitions or motions addressed to the court for the appointment of a new trustee, form not being of the essence of the matter. *Ibid.*

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BRIDGES.

Contract to build: Towns: Stopping work: Damages.

1. Where plaintiff, who had contracted to build a bridge for a town, stopped work thereon because notified so to do by the town chairman, the fact that he did not, until after the town had paid a second contractor who completed the bridge, make any claim that he intended to resume work or to hold the town liable or any objection to the use of materials which he had on the ground, did not estop him from recovering for breach of the contract by the town; and upon the question of estoppel it is immaterial whether the chairman had or had not authority to stop the work. *Jungdorf v. Little Rice*, 466
2. Where plaintiff contracted to build a bridge for a town which was to furnish and deliver the steel beams therefor at a certain place, failure of the town to furnish the steel as agreed was a breach which entitled plaintiff to treat the contract as at an end and to recover his damages. *Ibid.*
3. In such case the value of plank purchased by plaintiff and delivered to him at the work, but used by a second contractor in completing the bridge, might be considered in assessing plaintiff's damages, whether he had paid therefor or not. *Ibid.*

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BUILDING APPLIANCES: Safety. See MASTER AND SERVANT, 18–22.

BUILDING CONTRACTS. See BRIDGES. SPECIFIC PERFORMANCE.

BURDEN OF PROOF. See RAILROADS, 6, 11.

BURGLARY.

Possession of burglarious tools, etc.

A bottle of nitroglycerine and a fuse and detonating cap, though not actually in combination when found in the possession of a person, constituted a "machine, tool or implement designed and adapted for . . . forcing or breaking open any building, room, vault, safe or other depository," within the meaning of sec. 4411*a*, Stats. 1898. The contrary is not shown by the mere fact that said section was afterwards amended (ch. 88, Laws of 1911) so as to expressly include "nitroglycerine or other explosive." *State v. Boliski*, 78

CANCELLATION OF INSTRUMENTS.

See CONTRACTS, 4.

1. In an action to cancel a note and a purchase-money mortgage because of the failure of title to a part of the mortgaged lands which plaintiffs had purchased relying upon fraudulent representations by the mortgagee and defendant as to the death of the real heir thereto, such fraud having been established, the

exclusion of evidence as to the true consideration for the note and mortgage was unimportant because, regardless of what the consideration was, it was not a defense. *Mills v. Morris*, 38

2. If plaintiffs, having no knowledge that the real heir was alive, were induced to purchase the land in question by fraudulent representations of the vendor and defendant that such heir was dead or at least had not been heard from for ten years, the mere fact that they would not purchase without some reduction being made in the price as security against the remote chance of the heir being alive, would not prevent them from rescinding the sale because of such fraud. *Ibid.*

3. There having been an absolute failure of title to the land as to which rescission was sought, the grantee was not required to wait until dispossessed before instituting such action. *Ibid.*

CARRIERS. See EVIDENCE, 1. RAILROADS, 12.

CERTIORARI. See TAXATION, 5.

CHATTEL MORTGAGES. See FRAUDULENT CONVEYANCES.

CHILDREN.
Acts dangerous to. See NEGLIGENCE, 1–6.
Unlawful employment. See RAILROADS, 36–38.

CIRCUIT COURTS. See APPEAL, 4, 5, 13–15. COURTS, 2.

CITIES. See MUNICIPAL CORPORATIONS. WORKMEN'S COMPENSATION ACT, 1, 2.

CIVIL COURT of Milwaukee county. See APPEAL, 13–15. COURTS, 2.

CLAIMS. See EXECUTORS, 2, 3.

CLASSIFICATION. See CONSTITUTIONAL LAW, 6–8.

CLOUD UPON TITLE. See CONTRACTS, 4.

COLLATERAL SECURITY. See CORPORATIONS, 3. PRINCIPAL AND AGENT, 6.

COMMERCE. See NAVIGABLE WATERS, 8–11. RAILROADS, 31, 35.

COMMISSIONER OF BANKING. See BANKS AND BANKING. CORPORATIONS, 3.

COMPLAINT. See PLEADING.

COMPROMISE AND SETTLEMENT. See EVIDENCE, 3. JUDGMENT, 7. MASTER AND SERVANT, 30.

CONDEMNATION OF LAND. See MUNICIPAL CORPORATIONS, 14–25. NAVIGABLE WATERS, 10, 11.

CONDITIONAL SALES. See FRAUDULENT CONVEYANCES.

CONDITIONS PRECEDENT. See MUNICIPAL CORPORATIONS, 4. RAILROADS, 3.

CONFLICT OF LAWS. See FRAUDS, STATUTE OF, 1–6. RAILROADS, 35.

CONSENT to search. See SEARCHES, 2.

CONSIDERATION. See FRAUDS, STATUTE OF, 5. PARTNERSHIP, 3.

CONSTABLES. See FALSE IMPRISONMENT, 2, 3.

CONSTITUTIONAL LAW.

Police power. See COUNTIES, 3. MUNICIPAL CORPORATIONS, 30–33.

1. To be valid a police regulation must be reasonable. There must be reasonable ground for the police interference, the means adopted must be reasonable for the accomplishment of the purpose in view, and the degree of interference must be within the boundaries of reason. *Mehlos v. Milwaukee*, 591

2. As a rule, fundamental limitations of regulations under the police power are found in the spirit of the constitution, not in its letter, but are as efficient as if clearly expressed. *Ibid.*

3. Regulation within the constitutional scope of the police power makes constitutional guaranties efficient; and when an act of the legislature is said to be unconstitutional because unreasonable, the idea involved is that it impairs or destroys some inherent right instead of conserving it. *Ibid.*

4. Public dances or dance halls, since they are liable to be characterized by disorderly conditions or lead to breaches of the peace or promote immorality, are proper subjects for police regulation. *Ibid.*

5. The power to regulate such public dances and dance halls by requiring them to be licensed and to pay license fees need not be given to a city expressly and unmistakably. It is sufficient if general terms in the general welfare clause of the city charter show a reasonably clear purpose to clothe the municipality with such power. *Ibid.*

6. Nothing in the federal constitution exempts citizens of the United States from reasonable police regulations as regards person and property, or prevents legitimate classification for the purpose of police regulation. *Ibid.*

7. Classification for purposes of police regulation cannot ordinarily be made with such exactness that all the dangers to be guarded against will be found within the boundaries of the class to which the regulation is made to apply. All that is required is that there must be, in general, some reasonable basis on general lines for the division; and all reasonable doubts are to be resolved in its favor. *Ibid.*

8. The fact that many of the things which an ordinance regulating public dances and dance halls was designed to guard against may occur as well at a dance where patrons attend by invitation, and that other dances may be held at places and under conditions quite similar to those of such public dances as are within the ordinance, does not render the classification illegitimate or the ordinance void. *Ibid.*

Obligation of contracts. See COUNTIES, 4.

9. The state may breach its contracts if it will, subject to the payment of damages, without impairing the obligations of contracts, for it is because they are unimpaired that damages may be recovered for their breach. *McDougall v. Racine Co.* 663

Commerce. See NAVIGABLE WATERS, 8. RAILROADS, 31.

CONTRACTS.

Requisites and validity. See APPEAL, 17. FRAUDS, STATUTE OF. INSANE PERSONS. MASTER AND SERVANT, 30–32. PARTNERSHIP.

1. Where an oral agreement, complete in its terms, was made and by direction of one party the other commenced to perform it, the fact that they contemplated the making of a written contract embodying the same terms and the giving of a bond for performance, which was never done, did not prevent the oral contract partly performed from taking effect. *Jungdorf v. Little Rice,* 466

Same: Partly written and partly oral. See EVIDENCE, 5, 6.

Same: Varying by oral evidence. See SALES, 7, 9.

Entire contracts. See ELECTION OF REMEDIES, 2.

Construction and operation. See BRIDGES. DEEDS. EVIDENCE, 5, 6. LANDLORD AND TENANT, 1, 12. LOGS AND TIMBER. MUNICIPAL CORPORATIONS, 3. PARTNERSHIP. RECEIVERS. SALES, 1–9.

Reformation. See COURTS, 2. REFORMATION OF INSTRUMENTS.

Rescission. See CANCELLATION OF INSTRUMENTS.

2. The doctrine that one cannot affirm in part a contract or transaction tainted with fraud, and maintain an action for rescission as to the other part, is not without exceptions. The rule is equitable and ceases to operate where equity requires that it do so. *Mills v. Morris,* 38

3. One may retain the benefit of a contract or transaction and yet sue for damages on account of a breach affecting it in part, or may affirm in part and rescind in part, obtaining a proportionate rebate in the purchase price, where some such course is necessary to conserve the real right of the matter. *Ibid.*

4. Two tracts of land were conveyed by warranty deed to plaintiffs. The grantor was not the rightful owner of one of them, but had by false testimony as to the death of the real heir obtained a decree of the county court assigning it to her, and by similar false representations induced plaintiffs to purchase it with the other tract; and for a part of the whole purchase money about equal to the value of the tract which she did not own they gave to her a mortgage on both tracts. *Held,* that when the real heir appeared and claimed the tract rightfully belonging to him plaintiffs could, upon offering to surrender that tract to him, maintain an action to rescind the sale as to that tract and to cancel the mortgage as a cloud upon the title to the other tract. *Ibid.*

Impairing obligation. See CONSTITUTIONAL LAW, 9. COUNTIES, 4.

Performance or breach. See BRIDGES. CONSTITUTIONAL LAW, 9. CONTRACTS, 1. ELECTION OF REMEDIES, 2. SALES, 10–16.

5. In an action upon a contract for labor and material of the value of more than $9,000, it is *held* that the evidence (upon which the jury found that the reasonable cost of remedying the defects in the work would be $100) would fully warrant a finding of substantial performance. *Toepfer v. Sterr,* 226

6. Where, in such case, no question as to substantial performance was submitted to the jury and no such submission was requested, a finding of the court that there was such performance will be presumed in support of the judgment. *Ibid.*

Specific performance. See SPECIFIC PERFORMANCE.

Recovery of money paid on illegal contract: Laches. See MUNICIPAL CORPORATIONS, 35.

CONTRIBUTORY NEGLIGENCE. See HIGHWAYS, 3. INSTRUCTIONS TO JURY, 3. MASTER AND SERVANT, 3, 5, 7, 11, 13, 14, 21–23, 28, 29. NEGLIGENCE, 9–11. RAILROADS, 14, 26–32, 38. STREET RAILWAYS, 12.

CONVEYANCES. See CANCELLATION OF INSTRUMENTS. CONTRACTS, 4. DEDICATION. DEEDS. EVIDENCE, 6. FIXTURES, 2. JUDGMENT, 4. LIENS. NAVIGABLE WATERS, 10, 11. TAX TITLES. TRESPASS, 2.

CORPORATIONS.

Capital and capital stock.

1. The *capital* of a corporation is the property or means which the corporation owns, and it may vary in amount, while the *capital stock* is fixed, and represents the interests of the stockholders and is their property. *Estate of Wells,* 294

Accounting as to corporate stocks, etc. See ACCOUNTING.

Rights and liabilities of pledgee of stock. See CORPORATIONS, 2. PRINCIPAL AND AGENT, 6.

Dividends. See WILLS, 3, 5, 10.

Liability of stockholders. See LANDLORD AND TENANT, 2–4.

Directors: Discretion as to dividends. See WILLS, 10.

Officers: Liability for torts. See MASTER AND SERVANT, 2.

2. There are cases in which the manager of a corporation is equally liable with it for its torts. *Maahs v. Antigo L. Co.* 1

Insolvency: Winding up, etc. See BANKS AND BANKING. LANDLORD AND TENANT, 2–4. RECEIVERS.

Same: Reorganization: Purchase of property by one stockholder for all. See RECEIVERS, 3.

Same: Inspection of books.

3. Where an insolvent trust company, organized under the laws of Wisconsin, is in the hands of the commissioner of banking for the purpose of liquidation, the circuit court may properly provide by order for the examination of the books, business documents, accounts, and securities of the company by a person who holds stock therein which has been transferred to him by indorsement in blank as collateral security, although such stock has not been transferred on the books of the company. *In re Citizens S. & T. Co.* 277

Situs of corporation for income taxation. See TAXATION, 7, 8.

Foreign corporations. See TAXATION, 2–4.

COSTS.

Right to costs in general. See DRAINS.

1. No costs are recoverable in any judicial proceeding except as clearly authorized by statute. *In re Reeseville D. Dist.* 238

2. Statutes commonly give costs to the prevailing party against his adversary, and plain language would be required to provide for a recovery for the benefit of losing parties or their creditors. *Ibid.*

In actions for trespass.

3. "Wild" land, within the meaning of sec. 3575*m*, Stats. (relating to costs in actions for trespass by hunting or fishing on "wild and uninclosed lands"), is land in a state of nature, uninhabited, unoccupied, and uncultivated, and not in use by the owner, his agent or lessee, for any artificial purpose. Marsh land, however extensive, which is leased and used by a shooting club as a feeding and breeding place for wild fowl and for

purposes of hunting and fishing, and which, though unenclosed, is surrounded by cultivated farms, is not "wild" land. *Diana Shooting Club v. Kohl*, 257

4. In an action in justice's court for trespass upon lands not within the purview of said sec. 3575*m*, Stats., it was error to limit the costs against the defendant to a sum equal to the damages awarded, which were nominal. *Ibid.*

Same: On appeal from justice's court.

5. Where, in such case, upon appeal from the justice's judgment there was a new trial in the circuit court and plaintiff failed to obtain a more favorable judgment of damages, defendant was entitled to costs, under sec. 2925, Stats., and plaintiff cannot complain of a judgment in its favor for costs equal to the nominal damages recovered. *Ibid.*

In equitable actions: Discretion.

6. In an equitable action the allowance of costs, being a matter in the discretion of the trial court, will not be disturbed upon appeal unless there was an abuse of that discretion. *McGowan v. Paul*, 214

7. Where, in an equitable action by a taxpayer, contracts which had been entered into by town officers acting on behalf of the town in good faith and in accordance with the wishes of a great majority of the electors were held void because not within the power of the town, there was no abuse of discretion in awarding costs to the plaintiff against the town and not against the town officers. *Ibid.*

Motion costs as condition of pleading over.

8. Where, upon overruling a demurrer to a counterclaim, $10 costs of motion were imposed solely as a condition of plaintiff's right to serve a reply, but no reply was served, it was error to include such costs in a judgment against plaintiff. *Guaranteed Inv. Co. v. St. Croix C. C. Co.* 173

Taxation of costs.

9. A motion to review the taxation of costs which does not, as required by Circuit Court Rule XXXII, point out in what respect the moving party was aggrieved, is insufficient. *McGowan v. Paul*, 214

10. Items in plaintiff's bill of costs for fees for service of summons, injunctional order, etc., although supported by affidavit of his attorney that such disbursements had been or would necessarily be made or incurred, were properly disallowed in taxing the costs, where the record showed and the court found that such service was not made by an officer. *Ibid.*

COUNTERCLAIM. See PLEADING, 7.

COUNTIES.

Courthouses: Location: Contracts.

1. The expenditure of county moneys in the erection of a courthouse in violation of law may be enjoined in a taxpayers' action. *McDougall v. Racine Co.* 663

2. The question of the proper location of a courthouse is a governmental question, which is solely for the state to decide as it deems best, and that decision is not open to question by the county or the courts. *Ibid.*

3. Ch. 746, Laws of 1913 (amending sec. 656, Stats., so as to provide that "in the construction hereafter of any courthouse . . . no outer wall shall be nearer than forty feet to the boundary line of any privately owned contiguous premises," and that the plans shall be accompanied by a certificate of the circuit judge to the effect that he is advised by experts and believes that the court rooms will possess proper acoustical properties), is not invalid as being unreasonable or discriminatory. *Ibid.*

4. Where, at the time said act of 1913 took effect, contracts for the erection of a courthouse not complying therewith had already been made, but the work had not been commenced, the statute was applicable and was not invalid on the ground that it impaired the obligations of the contracts. *Ibid.*

COURTHOUSES: Location. See COUNTIES.

COURTS.

Opinions: Legal principles.

1. A legal principle having been developed and declared, in general, it applies to all situations within its scope, and is not limited to the particular situation suggesting it. The rule for the future is a part of the unwritten law which rests in principles; not merely in cases referred to for illustration. *Madison v. Southern Wis. R. Co.* 352

Jurisdiction. See COUNTIES, 2. COURTS, 2.

Orders: Explanation by evidence. See EVIDENCE, 2.

Supreme court. See APPEAL AND ERROR.

Circuit courts. See APPEAL, 4, 5, 13–15. COURTS, 2. EXECUTORS, 4.

County courts. See EXECUTORS, 4.

Civil court of Milwaukee county. See APPEAL, 4, 5, 13–15.

2. The civil court of Milwaukee county having no equitable jurisdiction, the affirmative defense of a mutual mistake in the execution of a contract sued on in that court is not available without reformation of the contract, and the action to reform is properly brought in the circuit court. *Garage E. M. Co. v. Danielson,* 90

CREDITORS. See ATTACHMENT. EXECUTORS, 2, 3. FRAUDULENT CONVEYANCES. GARNISHMENT. JUDGMENT, 5–7. LIENS. PARTNERSHIP. RECEIVERS.

CRIMINAL LAW AND PRACTICE.

See BURGLARY.

Where, upon a trial for an assault and battery in violation of a city ordinance, there was such a conflict in the testimony as ordinarily calls for determination by a jury, but both the district court and, on appeal, the municipal court directed a verdict of "not guilty," and it is extremely doubtful whether a different result would be reached by any jury, the judgment of acquittal should be affirmed on the ground that the error did not affect any substantial right of the city. *Milwaukee v. Plath,* 586

CROSS-EXAMINATION. See WITNESSES, 5.

CROSSINGS. See RAILROADS, 13–25, 30.

CUSTOMS AND USAGES.

See MASTER AND SERVANT, 12, 13. NEGLIGENCE, 2, 4, 13, 14. RAILROADS, 34. SALES, 1, 5, 6.

The rules of law applicable to a general custom are different from those applicable to a local custom. *Ross v. Northrup, King & Co.* 327

DAMAGES.

Adequacy: Nominal damages: Trespass.

1. In general, nominal damages suffice for the vindication of a legal title or right. *Diana Shooting Club v. Kohl,* 257

2. Although in this case nominal damages seem inadequate to vindicate plaintiff's right as against an intentional trespasser who shot ducks upon land leased and used by plaintiff for purposes of hunting and fishing and of breeding and preserving game and fish, yet, there having been no proof of other damage and the trial court not having exercised its discretion to set aside the verdict, this court does not feel authorized to interfere on the ground of such inadequacy. *Ibid.*

Assessment as entirety: Several causes of action.

3. Assessment of damages as an entirety will not be held error if some of the causes of action alleged were good and were supported by the evidence. *Fehlhaber v. McFadden,* 462

Harmless errors as to assessment. See APPEAL, 11, 12.

Interest, when allowable.

4. Interest on the damages from the time they accrue up to the time of verdict is a proper element of compensation in actions for injuries to property. *Bagnall v. Milwaukee,* 642

For breach of building contract. See BRIDGES, 3.

For breach of sale contract. See SALES, 10–16.

For deceit: Sale of land. See VENDOR AND PURCHASER, 5.

For wilful wrong: Mental suffering. See SEARCHES.

Excessive damages: Personal injuries. See APPEAL, 14, 15.

5. It appearing that plaintiff's injuries were painful; that the wound became infected and resulted in an ulcer, although there was no permanent substantial injury except a sensitive scar; that he was unable to work for three or four months; that he was earning from $3 to $3.50 per day; and that his medical expenses amounted to $65, damages in the amount of $900 are not excessive. *Hilden v. Great Lakes C. & D. Co.* 205

6. Although there was proof that causes adequate to produce a floating kidney existed before plaintiff's injury, and that the symptoms were to some extent the same before and after such injury, but more aggravated after it, the evidence considered as a whole is *held* to have warranted the jury in awarding substantial damages; and an award of $3,000 (reduced by the trial court from $6,000) is upheld. *Kinziger v. C. & N. W. R. Co.* 497

7. An award of $8,000 for serious and painful injuries to a man about twenty-six years old, including fractures of his right leg both above and below the knee which resulted in a short-

ening and bending of the leg and permanent impairment of its use, and an injury to the scrotum and its contents, is *held* not excessive. *Janiak v. Milwaukee Western F. Co.* 544

8. Plaintiff, who was seventy-two years of age, had one of his feet crushed almost to a pulp while the other was badly crushed, every bone in it broken, and the muscles torn apart. Three fourths of one foot was afterward amputated and an operation of skin grafting was required. His suffering was great, and he will never be able to walk without crutches. His actual expenses were $1,800, and he received $4,500 from a third party in consideration of a covenant not to sue. *Held*, that an award of $4,500, reduced by the trial court from $6,500, was not excessive. *Fuhrmann v. Coddington E. Co.* 650

Punitory damages. See SEARCHES, 3.

DEATH caused by negligence. See LANDLORD AND TENANT, 12, 13. RAILROADS, 13, 14, 27-30.

DEBTOR AND CREDITOR. See ATTACHMENT. EXECUTORS, 2, 3. FRAUDULENT CONVEYANCES. GARNISHMENT. JUDGMENT, 5-7. LIENS. PARTNERSHIP. RECEIVERS.

DECEIT. See PRINCIPAL AND AGENT, 6. VENDOR AND PURCHASER.

DEDICATION.

1. In the construction of a plat, acts of the donor and acquiescence of the donee long continued are indicative of the donor's intent. *Mayville v. M. E. Church*, 219

2. A lot designated upon a plat recorded in 1849 as "reserved for public buildings" was, seven years later, conveyed by the owners to a church society and the deed placed on record. Afterwards a church building was erected thereon and was occupied and used for church purposes for more than fifty years, during which time there were several conveyances by one church society to another, with confirmatory proceedings in court, and apparent acquiescence of the public in such occupancy and claim of title. *Held*, that a church, though not now considered a public building, has a *quasi*-public character; that the words of reservation must be construed to include a church; and that the grantee and its successors acquired the same interest in the lot as would inure to the owner or proprietor of a public building. *Ibid.*

3. Such interest in the lot or use thereof cannot be limited to the bare maintenance of a place of worship thereon, but must include all such adjuncts or accessories as are usual, necessary, and convenient in connection therewith, such as cloak rooms, school or recitation halls or buildings, and a pastoral residence or parsonage. *Ibid.*

DEEDS.

See EVIDENCE, 6. FIXTURES, 2. JUDGMENT, 4. RECEIVERS, 2. TAX TITLES.

A sale and conveyance of realty abutting upon a street, in the absence of express indications to the contrary, includes the land to the center of the street, and the mere fact that a lot is described by metes and bounds following the lot lines does not bring a case within the exception. *Hannon v. Kelly*, 509

DEFAMATION. See LIBEL AND SLANDER.

DEFAULT. See JUDGMENT, 1.

DEFINITIONS. See WORDS AND PHRASES.

DELAY. See JUDGMENT, 3, 4. LIENS. MUNICIPAL CORPORATIONS, 35. REFORMATION OF INSTRUMENTS, 3.

DELIVERY. See PRINCIPAL AND AGENT, 5.

DEMURRER. See COSTS, 8. PLEADING.

DEPOT GROUNDS. See RAILROADS, 30.

DIRECTING VERDICT. See STREET RAILWAYS, 11.

DISBURSEMENTS. See COSTS, 10.

DISCRETION. See COSTS, 6, 7. INTOXICATING LIQUORS, 2. JUDGMENT, 1. PARTIES. TRIAL, 1. WILLS, 10.

DIVORCE.

See WILLS, 1.

It would seem that a judgment of divorce granted pursuant to sec. 2374, Stats., is effectual when entered to dissolve the marriage contract, subject to the conditions prescribed in the statute. *Rogers v. Hollister*, 517

DOCKS. See MUNICIPAL CORPORATIONS, 14–25.

DOGS. See ANIMALS, 3, 4.

DOMICILE. See TAXATION, 5, 6.

DRAINS.

1. In sec. 11, ch. 419, Laws of 1905 (sec. 1379—21, Stats. 1911),—providing that when a drainage petition or proceeding is dismissed as provided in secs. 4, 7, or 27 of said chapter "a judgment shall be entered against the petitioners and in favor of the commissioners for the costs, expenses and liabilities incurred in said proceedings, but for the benefit of those who have rendered services or advanced money in the prosecution of said proceedings, or have recovered costs on successful contests therein,"—the reference to sec. 4 (sec. 1379—14) was obviously a mistake, since in case of a dismissal under that section there would be no commissioners in whose favor judgment could be entered. *In re Reeseville D. Dist.* 238

2. In construing the statute the court cannot go so far as to read into it the word "contestants," so as to make it provide for a judgment in favor of such contestants for the costs, expenses, and liabilities mentioned in case of a dismissal under said sec. 4. *Ibid.*

3. The fact that the legislature subsequently (by ch. 633, Laws of 1913) amended the statute so as to provide for "a judgment in favor of the contestants or commissioners," does not indicate that the word "contestants" was previously left out by mistake. *Ibid.*

4. Whether sec. 1379—21, Stats., deals with costs and expenses of any persons other than those who have successfully prosecuted or defended as petitioners, commissioners, or contestants, is doubted. *Ibid.*

EASEMENTS. See NAVIGABLE WATERS, 10, 11.

EJECTMENT.

Pleading: Counterclaim: Equitable relief.

1. In ejectment a counterclaim for equitable relief cannot be sustained if the cause of action alleged therein constitutes a good legal defense and the defendant has a complete and adequate remedy at law as efficient as in equity. *Guaranteed Inv. Co. v. St. Croix C. C. Co.* 173

2. In a proper case an equitable defense may be made in an action of ejectment where the defense at law is not adequate and a good cause of action in equity is pleaded. *Ibid.*

Judgment: When on the merits.

3. In ejectment defendant set up title in himself and demanded judgment that the title and right of possession were in him. The cause was tried by the court. At the close of plaintiffs' testimony defendant moved for judgment dismissing the complaint because plaintiffs had failed to establish title in themselves. The court granted the motion and found as a conclusion of law that defendant was entitled to judgment dismissing the action upon the merits, and judgment was entered accordingly in that form. *Held*, that the judgment was one on the merits and was proper. *Comstock v. Boyle*, 134 Wis. 613, distinguished. *Walker v. Rockman*, 190

New trial.

4. Plaintiffs in ejectment being entitled to a new trial as a matter of right under sec. 3092, Stats., it was immaterial that the notice of motion therefor was not served on defendant. *Walker v. Rockman*, 190

5. An order for a new trial in ejectment, granted under sec. 3092, Stats., becomes effective upon payment of the statutory costs and the filing of an undertaking which in form complies with the statute and the order. *Ibid.*

6. The statute does not, in such case, require the court to approve the undertaking. *Dickinson v. Smith*, 139 Wis. 1, distinguished. *Ibid.*

7. Nor is the provision in sec. 2702, Stats., relating to the service of a certified copy of the undertaking, applicable to actions of ejectment. *Ibid.*

8. The sureties in the undertaking are, under sec. 3092, Stats., required to justify only in case objection is made to their sufficiency. Defendant has the right to make such objection and to have proceedings stayed until the sureties justify; and if they fail to do so and plaintiff fails to furnish a new and sufficient undertaking, defendant is entitled to have the order vacating the judgment set aside as a matter of course. *Ibid.*

ELECTION OF REMEDIES.

See LANDLORD AND TENANT, 4. SALES, 11, 12.

1. Where, in an action for personal injuries to an employee, the complaint stated a cause of action for tort and also a cause of action based on an agreement for settlement, plaintiff had at least the right to elect to prove his cause of action for tort. *Maahs v. Antigo L. Co.* 1

2. Where, in an action upon a contract for labor and materials, defendants counterclaimed for damages by reason of breaches by plaintiff, and the case was tried on that issue, this constituted an election between remedies, precluding defendants from afterwards insisting that the plaintiff was entitled to nothing because the contract was entire and had not been substantially performed. *Toepfer v. Sterr*, 226

ELECTIONS.

See PUBLIC UTILITIES.

The rule that a vote to fill offices at a general election is not invalidated by insufficient election notice where it appears that the electors, by reason of the existence of general laws, knew of the election and of the offices to be filled in time to enable them to express their choice, does not apply to special elections or to special questions submitted at a general election, there being no presumption that the voters knew of those matters. *Janesville W. Co. v. Janesville*, 655

EMINENT DOMAIN. See MUNICIPAL CORPORATIONS, 14–25. NAVIGABLE WATERS, 10, 11.

EMPLOYERS' LIABILITY ACTS. See MASTER AND SERVANT. RAILROADS, 35. WORKMEN'S COMPENSATION ACT.

ENTIRE CONTRACT. See ELECTION OF REMEDIES, 2.

EQUITY.

See ACCOUNTING. BANKS AND BANKING. CANCELLATION OF INSTRUMENTS. CONTRACTS, 2–4. COSTS, 6, 7. COUNTIES, 1. COURTS, 2. EJECTMENT, 1, 2. ESTOPPEL. HUSBAND AND WIFE. JUDGMENT, 3, 4. LIENS. PARTNERSHIP, 3. PLEADING, 4. PRINCIPAL AND AGENT, 4. RECEIVERS. REFORMATION OF INSTRUMENTS. SPECIFIC PERFORMANCE. WILLS, 3–10.

1. In an action for equitable relief the objection that plaintiff has an adequate remedy at law is waived if not taken by demurrer or answer. *Garage E. M. Co. v. Danielson*, 90

2. Under sec. 2649*a*, Stats., where equitable relief is asked, the fact that there is an adequate remedy at law is not legitimate ground for a general demurrer. *Sullivan v. Ashland L., P. & S. R. Co.* 445

ESTATES OF DECEDENTS. See EXECUTORS. WILLS.

ESTATES FOR LIFE. See WILLS, 3–10.

ESTOPPEL.

See BRIDGES, 1. HIGHWAYS, 1.

1. Estoppel *in pais* is the preclusion of a party to assert an otherwise conceded right because by words or conduct he has misled the other party with respect to the existence or assertion of that right in such manner and to such degree that the position of the parties cannot be equitably restored. *Jungdorf v. Little Rice*, 466

2. A change of position by one person in reliance upon the conduct of another is essential to an estoppel *in pais*. *Zwietusch v. Luehring*, 96

EVIDENCE.

Judicial notice. See MASTER AND SERVANT, 26. RAILROADS, 9.

Presumptions: Burden of proof. See RAILROADS, 6, 11.

Relevancy, materiality, and competency. See LANDLORD AND TENANT, 6. MASTER AND SERVANT, 15, 29. NAVIGABLE WATERS, 6. NEGLIGENCE, 13, 14. RAILROADS, 33. SALES, 9, 15. SEARCHES, 1, 2.

1. In an action to recover the value of a second-hand feed mill which was lost by a carrier in transit and which had no specific market value, plaintiff having introduced opinion evidence as to its value, it was competent for defendant to show what the mill was bought for about the time of shipment. *Maas v. C. & N. W. R. Co.* 44

2. An order of court cannot be explained by evidence of a conversation between an attorney of one of the parties and the presiding judge. *Zwietusch v. Luehring,* 96

3. Offers of settlement made before or after suit are not admissible against the party making them. *Tobin v. Nichols,* 235

Res gestæ: Statements by injured employee. See INSTRUCTIONS TO JURY, 4.

4. In an action for a personal injury, statements made by the plaintiff immediately after the accident, or while leaving the scene of the accident and within 100 feet thereof, to the effect that it was his own fault, are admissible as part of the *res gestæ* and hence not within the purview of sec. 4079*m*, Stats. 1911. *Dixon v. Russell,* 161

Admissions. See INSTRUCTIONS TO JURY, 4.

Parol evidence affecting writings. See PRINCIPAL AND AGENT, 3. SALES, 7, 9.

5. Where a writing is but a part execution of an entire oral contract, the parties having elected to permit the rest to remain in parol, such remainder may be shown by oral testimony; but the writing is not to be contradicted, and if it clearly indicates that it was intended to embody the entire contract the oral testimony is not admissible. *Hannon v. Kelly,* 509

6. In the case of a sale of a certain hotel property the fact that the deed, in addition to describing the real estate, mentioned the furniture in certain rooms as also conveyed (a schedule of same being attached), but did not refer to the platform hay scales in the street adjacent to the hotel, did not preclude testimony to show that in the oral contract of sale the scales were included, even assuming the scales to be personal property. *Ibid.*

Opinion evidence. See EVIDENCE, 1. RAILROADS, 15, 16, 39. WILLS, 7.

7. Any estimate of speed by a witness is in one sense opinion, but it may not be opinion evidence within the legal meaning of that term. *Riger v. C. & N. W. R. Co.* 86

8. The evidence of a physician that he based his diagnosis of a fracture at the base of the brain, in the case of a patient who was unconscious, delirious, and suffering from severe injuries, lacerations, and contusions of the face, in part upon the history of the accident told him by some person, did not render his opinion incompetent on the ground that such history was not shown to have been truthful, especially where he was not asked to detail the history so given to him. *Leora v. M., St. P. & S. S. M. R. Co.* 386

9. It being competent for the physician in such case to testify that in his judgment there was a fracture at the base of the brain, it was competent to include that fact in a hypothetical question addressed to other medical experts. *Ibid.*

10. Opinion evidence as to the value of property which has no specific market value is not binding upon the jury, and they may find a lower or a higher value than the undisputed opinion evidence shows. *Maas v. C. & N. W. R. Co.* 44

Weight and sufficiency. See INSTRUCTIONS TO JURY, 4, 5. MASTER AND SERVANT, 27, 30. RAILROADS, 13, 15, 16, 21, 39. SALES, 16. SEARCHES, 2. WILLS, 7.

Same: Positive and negative testimony. See INSTRUCTIONS TO JURY, 5. RAILROADS, 13, 21.

Degree of proof required. See REFORMATION OF INSTRUMENTS.

Reception of evidence: Rebuttal. See TRIAL, 1. 2.

Evidence in proceeding before railroad commission. See RAILROADS, 5–11.

Harmless errors in exclusion of evidence. See APPEAL, 9, 10. CANCELLATION OF INSTRUMENTS.

EXAMINATION of witnesses. See WITNESSES, 4, 5.

EXCEPTIONS. See APPEAL, 7.

EXCESSIVE DAMAGES. See DAMAGES, 5–8.

EXECUTORS AND ADMINISTRATORS.

See WILLS.

1. Where an administratrix continued the business of her decedent and in so doing bought goods which were necessary for the preservation of the estate, she was entitled to reimbursement in her final settlement. *C. W. Beggs, Sons & Co. v. Estate of Behrend,* 34

2. Although in such case the indebtedness for the goods was one due from the administratrix and not from the estate, the allowance of the vendor's claim when filed against the estate was not a prejudicial error, where the administratrix was also the sole heir, the estate was solvent, and all parties interested were before the court. *Ibid.*

3. A creditor of a decedent cannot take possession of personal property of the estate after the death of the owner and then, in the consequent replevin action by the administrator, offset his demand against the deceased. Sec. 3847, Stats., does not apply to such a case. *Weissman v. Weissman,* 26

4. In a proceeding for the settlement of the final account of executors, the whole subject of their handling of the estate is open for consideration in the county court and also, *de novo,* upon appeal to the circuit court; hence the mere fact that certain matters properly within the scope of the proceeding were not suggested or considered in the county court does not preclude consideration thereof and action thereon in the circuit court; and no special petition for consideration of such matters is necessary. *Estate of Wells,* 294

EXEMPTIONS. See TAXATION, 1–4.

EXPERT TESTIMONY. See EVIDENCE, 1, 7–10. RAILROADS, 15, 16, 39. WILLS, 7.

FALSE IMPRISONMENT.

1. Presence of the plaintiffs in an action in justice's court at the time when the defendant therein was brought before the justice pursuant to a civil warrant of arrest, was proper; and their mere presence, without participation in the proceedings, did not render them liable for a mistake of the justice in demanding of the defendant a bond in excess of the statutory requirements. *Grab v. Lucas*, 504

2. Officers having in their custody persons under arrest may lawfully place them for safe-keeping in any proper and suitable place, such as a city or county jail. *Ibid.*

3. A person so placed in jail by a constable having him in custody remained, in contemplation of law in the custody of the constable, although the sheriff was the custodian of the jail. *Ibid.*

FALSE REPRESENTATIONS. See CANCELLATION OF INSTRUMENTS. CONTRACTS, 4. VENDOR AND PURCHASER.

FELLOW-SERVANTS. See MASTER AND SERVANT, 24.

FENCES. See RAILROADS, 26–31.

FILING of undertaking. See APPEAL, 6. EJECTMENT, 5.

FINDINGS OF FACT. See APPEAL, 13. CONTRACTS, 6. TRIAL, 6.

FIXTURES.

1. Where an article is plainly a fixture and part of the real estate, no concession by counsel during the trial of an action, even though indorsed by the court, can change the obvious fact and make such article personalty. *Hannon v. Kelly*, 509

2. Platform hay scales used in connection with a hotel property and owned by the hotel proprietor, set in the ground in the customary manner, though outside the lot line and within the boundaries of the street, were a fixture and unless expressly reserved would pass by a deed conveying the lot. *Ibid.*

FORECLOSURE. See LIENS.

FOREIGN CORPORATIONS. See TAXATION, 2–4.

FOREIGN STATUTES. See FRAUDS, STATUTE OF, 4, 5.

FORMER ADJUDICATION. See APPEAL, 17.

FRANCHISES. See STATUTES, 13. STREET RAILWAYS, 1–10.

FRAUD. See CANCELLATION OF INSTRUMENTS. CONTRACTS, 4. PRINCIPAL AND AGENT, 4–6. VENDOR AND PURCHASER.

FRAUDS, STATUTE OF.

Promise to answer for debt of another: Consideration: Conflict of laws. See RECEIVERS, 2.

1. Where certain stockholders of a corporation, by an agreement in writing reciting their interest in the business of the corporation and their desire to assist it in obtaining credit and money, promised that if the plaintiff bank would discount certain promissory notes of one N. held by such corporation they would pay the same at maturity, such writing was not a mere collateral agreement to answer for the debt or default of another but an original promise by the signers to pay what became under the agreement their own debt. *Drovers' Deposit Nat. Bank v. Tichenor*, 251

2. Although such instrument was called therein a "guaranty," its nature is determined by its terms, which are those of an absolute and unconditional promise to pay. *Ibid.*

3. The word "guaranty" is often used as a synonym for promise, and to denote an absolute agreement. *Ibid.*

4. Such writing having been executed in Illinois and the notes being payable in London, England, if it should be construed as an agreement to answer for the debt or default of another it would be governed by the Illinois or English statute of frauds, neither of which requires that the consideration be expressed in the writing. *Ibid.*

5. Both the statutes referred to require a consideration to support such a promise; but a consideration may consist of a benefit to the promisor or a detriment to the promisee, and the discounting of the notes by the promisee in reliance upon the promise was a sufficient consideration. *Ibid.*

6. It is not intended to hold that, upon the facts as stated, the agreement, even if construed as a promise to answer for the debt of another, would not be valid under our statute of frauds. *Ibid.*

Contract for conveyance of land.

7. An oral contract to pay for the services of a broker by the conveyance of real estate to him is void under the statute of frauds (sec. 2304, Stats.) and for services rendered under such contract he may recover *quantum meruit*. *Seifert v. Mueller*, 629

FRAUDULENT CONVEYANCES.

See ATTACHMENT. TAX TITLES, 3–5.

1. So far as the rights of creditors are concerned, an agreement by which a stock of merchandise is transferred upon deferred payments, with the provision that the business shall be continued, the stock kept up by new purchases, and the vendor have the title of the entire stock, including the additions, as security for the purchase price, is in legal effect a chattel mortgage and is governed by the provisions of sec. 2316*b*, Stats., notwithstanding the parties have called it an agreement of conditional sale. *Lauerman Bros. Co. v. Riehl*, 12

2. Words merely indicating an intention to make a transfer of book accounts at some future time, unaccompanied by delivery of the books or the accounts or by any other act indicating an intention to relinquish control over the accounts or pass the title to the alleged assignee, did not constitute a valid assignment as against creditors of the assignor. *Ibid.*

FRAUDULENT REPRESENTATIONS. See CANCELLATION OF INSTRUMENTS. CONTRACTS, 4. VENDOR AND PURCHASER.

GARNISHMENT.

An affidavit for garnishment under sec. 2753, Stats., in an action sounding in tort, must state all those things which are required by sec. 2731 to be stated in an affidavit for an attachment in such an action. *Pedlas v. Golbus*, 341

GIFTS. See WITNESSES, 1.

GRADE CROSSINGS. See RAILROADS, 13–25.

GROSS NEGLIGENCE. See NEGLIGENCE, 3. RAILROADS, 29. STREET RAILWAYS, 11.

GUARANTY. See FRAUDS, STATUTE OF, 2, 3.

GUARDIAN AND WARD. See WILLS, 2.

GUARDIANS AD LITEM.

1. Guardians *ad litem* are public officers of justice. Their work is primarily and chiefly the performance of a duty imposed by the court upon its own officers to aid it in the administration of the law; and the "compensation" which, under sec. 4041b, Stats., may be allowed to them means a reasonable charge, not measured by the high salaries or rewards for services which large establishments and wealthy clients may voluntarily pay to lawyers of their choice, but measured more nearly by the compensation which the law allows to public officers having similar duties. *Estate of Wells*, 294
2. Allowances to guardians *ad litem* in this case amounting to about $33 per day for days spent in court, and $17.50 per day for days spent out of court, are *held* to be too large by about fifty per cent. *Ibid.*

HARBORS. See MUNICIPAL CORPORATIONS, 14–25. NAVIGABLE WATERS, 8–11.

HARMLESS ERRORS. See APPEAL, 8–15.

HIGHWAYS.

Laying out: Estoppel: Discontinuance: Warning.

1. Where, after an order was made laying out a highway, it was worked and traveled so that there was a beaten track over it, and public money was expended upon it, the town is estopped to deny that it was a public highway, even though there had been no award of damages and no order opening the road. *Hanson v. Clinton*, 147
2. In such case, if any part of the road became defective so that it was necessary that travel thereon be discontinued while such defective condition existed, it was the duty of the town to give such notice or warning or erect such barriers as would prevent its use by travelers by night as well as by day, and in the absence of such notice travelers had the right to presume that it had not been discontinued or obstructed. *Ibid.*

Injury from defects.

3. In an action to recover for personal injuries caused by a defective highway, evidence showing, among other things, that plaintiff's driver was driving slowly, that it was dark, and that he could not see the defect which caused the accident, is *held* to sustain a finding that plaintiff was not guilty of contributory negligence. *Hanson v. Clinton*, 147

Same: Sidewalks. See WORKMEN'S COMPENSATION ACT.

HOMESTEAD. See HUSBAND AND WIFE.

HUNTING AND FISHING. See COSTS, 3–5. DAMAGES, 2. NAVIGABLE WATERS, 1–7.

HUSBAND AND WIFE.

See DIVORCE. WILLS, 1.

1. A wife is not a proper party plaintiff in an action by her husband to recover damages for and to abate a nuisance affecting his

real property in which she has no separate estate, even though such real property is his homestead. *Prochnow v. N. W. Iron Co.* 408

2. The fact that money advanced by the wife to her husband went into the property is immaterial in such case, where no trust resulted in her favor and the whole title remains in the husband. *Ibid.*

HYPOTHETICAL QUESTIONS. See EVIDENCE, 9.

IMPAIRING OBLIGATION OF CONTRACT. See CONSTITUTIONAL LAW, 9. COUNTIES, 4.

IMPLIED WARRANTY. See SALES, 1–6, 8.

IMPRISONMENT. See FALSE IMPRISONMENT.

IMPROVEMENTS. See MUNICIPAL CORPORATIONS, 4–28.

INCOME TAX. See TAXATION, 7–10.

INCOMPETENCY OF SERVANT. See MASTER AND SERVANT, 25–27.

INDEFINITENESS. See PLEADING, 6.

INDEMNITY INSURANCE. See MASTER AND SERVANT, 30–32.

INFANTS.

Liability for torts. See NEGLIGENCE, 12.

Infants are liable for their tortious acts. *Paradies v. Woodard,* 243

Liability for injuries to infants: Unlawful employment. See RAILROADS, 36–38.

Same: Dangerous acts: Attractive objects. See NEGLIGENCE, 1–6.

Fraudulent conveyance to infant: Right to redeem from tax sale. See TAX TITLES, 3–5.

INJUNCTION. See COUNTIES, 1.

INSANE PERSONS.

1. A person who, in general, is insane may bind himself by contract made during a lucid interval which renders him capable of appreciating the nature of his acts and exercising judgment in respect thereto. *American G. Co. v. Kringel,* 94

2. A finding by the circuit court that at the time of the execution of promissory notes the maker was an insane person, mentally incompetent to transact business, is *held* to be sustained by the evidence. *Ibid.*

INSOLVENCY. See BANKS AND BANKING. CORPORATIONS, 3. LANDLORD AND TENANT, 2–4, 7, 8. RECEIVERS.

INSPECTION OF BOOKS. See CORPORATIONS, 3.

INSTRUCTIONS TO JURY.

Requests for instructions. See MUNICIPAL CORPORATIONS, 9–12.

1. A party desiring more particular instructions to the jury than are contained in the brief but correct charge of the court should present them. *Landry v. Webster Mfg. Co.* 248

2. It is not error to refuse to give a requested instruction which is substantially given in the general charge. *Dixon v. Russell,* 161

Customary location of switch stands. See RAILROADS, 34.

Damages. See MUNICIPAL CORPORATIONS, 9–12. VENDOR AND PURCHASER, 5.

Negligence, proximate cause, etc.

3. The charge in this case is *held* to have properly stated the issues and correctly instructed the jury as to ordinary care, proximate cause, and contributory negligence. *Landry v. Webster Mfg. Co.* 248

Weight of evidence: Positive and negative testimony.

4. An instruction that evidence as to admissions of a party made in casual conversations and to disinterested persons is regarded as the weakest kind of evidence, was properly refused when requested as applicable to statements forming part of the *res gestæ*. *Dixon v. Russell,* 161

5. Where two witnesses testified to certain statements made by the plaintiff, and other witnesses testified that they were present and heard nothing to that effect, it was proper to give an instruction as to the relative weight of positive and negative testimony. *Ibid.*

INSURANCE: Employers' liability. See MASTER AND SERVANT, 30–32.

INTENT. See ATTACHMENT. DEDICATION. PARTNERSHIP, 1.

INTEREST. See DAMAGES, 4.

INTERLOCUTORY JUDGMENT. See DIVORCE. WILLS, 1.

INTERSTATE COMMERCE. See NAVIGABLE WATERS, 8–11. RAILROADS, 35.

INTOXICATING LIQUORS.

1. Sec. 1565*d*, Stats. 1911, has no bearing on the transfer of a license from one locality to another during the life of such license. *State ex rel. Chandler v. Mayor,* 203

2. If a city council has power to transfer a license issued for one locality to another, such power is discretionary and *mandamus* will not lie to control that discretion. *Ibid.*

INTOXICATION: Negligence. See RAILROADS, 14, 27, 29.

JAILS. See FALSE IMPRISONMENT, 2, 3.

JOINDER.
Of causes of action. See ACCOUNTING. PLEADING, 5.
Of parties. See ACCOUNTING. APPEAL, 3. HUSBAND AND WIFE. JUDGMENT, 4. RECEIVERS, 3.

JUDGMENT.

When on the merits. See EJECTMENT, 3.

Conditions of entry. See TAX TITLES, 6.

Entry contrary to verdict as understood: Surprise. See TRIAL, 6.

By default: Opening.

1. An order refusing to open a default and reinstate a cause is a discretionary order and will not be disturbed unless there was an abuse of discretion. *State ex rel. Yager v. Wilcox,* 172

On foreclosure of lien: Waiver of rights. See LIENS, 3.

Vacating: Real party in interest.

2. The real party in interest, though not a party of record, may, under sec. 2832, Stats., have a judgment vacated upon a proper showing within one year after its entry. *Langlade R. Co. v. Magee,* 457

3. Actual notice of the entry of judgment in such a case was sufficient to require the exercise of reasonable diligence in seeking relief therefrom. *Ibid.*

4. In an action to establish and quiet title to land, wherein notice of *lis pendens* was filed and defendant disclaimed title, alleging a conveyance (unrecorded) by it to other persons before the action was begun, such other persons are *held*, under circumstances stated in the opinion, to have been guilty of laches and hence not to be entitled to any equitable relief against the judgment. *Ibid.*

Same: New trial in ejectment. See EJECTMENT, 4–8.

Effect of divorce judgment. See DIVORCE. WILLS, 1.

Conclusiveness: Upon whom binding. See APPEAL, 17. JUDGMENT, 4.

Offsetting judgments: Authority of attorney.

5. Where a judgment creditor is sued by his debtor upon a different cause of action, he may plead his judgment by way of counterclaim, and if a balance be found due him from plaintiff may have judgment therefor. *Washburn W. W. Co. v. Washburn*, 434

6. Where a water company operating by virtue of a franchise granted to it by an organized town having within its limits an unincorporated village of more than 1,000 inhabitants, sued such town for hydrant rental, and the latter counterclaimed for certain judgments previously obtained against the water company, it was no defense to such counterclaim that by agreement with a former attorney for such town the judgments had been set off against a judgment the water company had recovered against a city formed from such unincorporated village, it not appearing that such attorney had any authority from the town to make such offset. *Ibid.*

Settlements: Transfer of title to judgment.

7. After judgment in such action in favor of the town upon its counterclaim, a motion was made for a new trial based upon affidavits showing that in another action between such town and such city and another town formed in part out of the original town, to settle the equities of the respective parties in the judgments against the water company, the city's proportion had been fixed by a referee at a certain sum, and that the water company had "settled" with the city, but not showing that any money had been paid to the city. *Held*, that the findings of the referee did not operate to transfer title to the judgments or any interest therein to the city, and the motion was properly denied. *Ibid.*

JUDGMENT ROLL. See APPEAL, 7.

JUDICIAL NOTICE. See MASTER AND SERVANT, 26. RAILROADS, 9.

JUDICIAL SALES. See LANDLORD AND TENANT, 1–6. RECEIVERS.

JURISDICTION. See COUNTIES, 2. COURTS, 2. TAXATION, 5.

JURY.

In an action for a personal injury to an employee it was not error to refuse to permit jurors to be examined as to their business relations or connections, if any, with certain insurance companies which were not claimed to be interested directly or indirectly in the controversy. *Dixon v. Russell*, 161

JUSTICES' COURTS. See COSTS, 3–5. FALSE IMPRISONMENT.

JUSTIFICATION of sureties. See EJECTMENT, 8.

LACHES. See JUDGMENT, 3, 4. LIENS. MUNICIPAL CORPORATIONS, 35. REFORMATION OF INSTRUMENTS, 3.

LANDLORD AND TENANT.

Assignment of lease: Insolvency of lessee: Judicial sale of leasehold: Liability of real purchasers for rent: Discharge of other parties liable. See RECEIVERS. WITNESSES, 2, 3.

1. Although a lease in terms requires the lessor's consent to an assignment thereof, such consent is not required where the assignment is by operation of law, as in the case of a judicial sale. *Zwietusch v. Luehring*, 96
2. Where a lease provided that an assignment should not release the party assigning, though consented to by the lessor, but that in such case both assignor and assignee should be liable, a statement by the lessor, at a receiver's sale of the leasehold interest, that he had no objection to the sale but would do nothing to jeopardize his claim against the stockholders of the corporation whose assets were being sold, could not be construed as a refusal to consent to the transfer. *Ibid.*
3. The lessor having been given no opportunity to accept the written obligation of the purchaser, a mere statement by him after the sale that he would be a fool to take such obligation when he had an opinion from his attorney that wealthy men, stockholders in said corporation, were liable to him, would not amount to a refusal to assent to the transfer, especially when made in ignorance of the fact that the men referred to were among the real purchasers. *Ibid.*
4. The remedy, if any, against stockholders of the insolvent lessee was not inconsistent with holding the subsequent assignees or purchasers of the lease for the rent; hence there was no election by the lessor between inconsistent remedies. *Ibid.*
5. Acts of the lessors of property, after a receiver's sale of the lease, nominally to an individual purchaser who in fact represented responsible associates, evincing an unwillingness to recognize such nominal purchaser as tenant, all of which acts were done in ignorance of their claim against such associates, do not amount to a waiver of such claim. *Ibid.*
6. In an action to charge the real purchasers of a leasehold with the rent reserved in the lease, the legal proceedings in which the sale was ordered, the agreement between the nominal purchaser and the other defendants, and their organization of a corporation to take over the lease, were all competent evidence. *Ibid.*
7. Where the assignee of a lease became insolvent and failed to pay the rent, the leasing of the premises by the lessors to a third person at a reduced rental before the expiration of the term, under an agreement with the assignors that it should not "prejudice or affect in any way the rights or claims of the lessors against any of the parties liable upon or under the original lease" if any liability existed thereunder, did not amount to a surrender of the lease or a re-entry of the lessors and did not release the parties so liable, but they were entitled to credit for the rent received. *Ibid.*
8. An option to purchase the leased premises given by the lessor to a third person, without any mention of the lease, which op-

tion was never accepted and never became a binding contract, did not constitute a re-entry so as to relieve the lessee from the payment of rent. *Ibid.*

Tenancy from year to year: Termination.

9. A notice in writing to a tenant from year to year, given on March 26th, to the effect that his lease expires on April 30th (the end of the rental year) and that from and after the latter date the lessor will consider him a tenant from month to month at a specified increased monthly rental, was sufficient in form, under sec. 2187, Stats., to put an end to the tenancy from year to year. *Pabst B. Co. v. Milwaukee L. Co.* 615

10. Where the tenant, without making any response to such notice, continued to occupy the premises and paid rent at the increased rate, a new tenancy from month to month was created upon the terms of the notice. *Ibid.*

11. A letter from the lessor to the lessee, written in July following, stating that it had an offer to lease the property for a term of ten years from May 1st of the next year, and asking the intentions of the lessee as to occupying the same after that date, to which the lessee replied that it expected to occupy its new quarters by that date, did not modify the terms of the notice above mentioned nor create a tenancy to said May 1st. *Ibid.*

Duties and liabilities of lessor: Injury to tenant.

12. Where, by the terms of a lease of an apartment in his building, the lessor retained possession and control of a hallway and the fixtures therein, it being expressly declared that such hallway was not leased and was only to be used by the lessee for ingress and egress, it was the lessor's duty to maintain the hallway in a reasonably safe condition for such use by his tenants. *Inglehardt v. Mueller,* 609

13. Where, in such case, a radiator in the hallway fell, by reason of being insecurely attached to the wall, and killed a child of the lessee, and the lessor ought, in the exercise of ordinary care, to have discovered the danger and repaired the fastening before the time of the accident, the lessor was guilty of actionable negligence even though he had no actual knowledge of the defect. *Ibid.*

LAW OF THE CASE. See APPEAL, 17.

LEASES. See LANDLORD AND TENANT. RECEIVERS. WITNESSES, 2, 3.

LIBEL AND SLANDER.

Words actionable per se: Pleading: Innuendo.

1. Words falsely spoken of a person in his capacity as cashier of a trust company, charging him with being crooked, with raising the amount of a note, with forging a note, and with "beating" a depositor out of money by obtaining the surrender of a certificate of deposit without in fact paying it, were actionable *per se.* *Fehlhaber v. McFadden,* 462

2. The objection that the complaint was not sufficiently specific in that it did not allege that the words were spoken of and concerning the plaintiff with reference to his business, was not well taken, especially when first made after answer to the merits and verdict in plaintiff's favor. *Ibid.*

3. Upon demurrer to a complaint for slander it is sufficient that the words alleged to have been spoken are in popular usage fairly

capable of expressing and conveying to others the slanderous meaning attributed to them by the innuendo, the sense in which they were intended and in which they were understood by the hearers being a question of fact for the jury. *Lisko v. Retzlaff*, 247

Privilege: Affidavits in legal proceedings: Relevancy.

4. A demurrer to a complaint for libel based upon certain statements contained in an affidavit for a new trial does not admit mere conclusions of the pleader, such as that the affidavit and its contents were irrelevant to the motion. *Keeley v. Great Northern R. Co.* 181

5. The fact that the court to which the affidavit was presented disapproved of and refused to consider it and denied the motion for a new trial, is not conclusive that it was in fact irrelevant or improper. *Ibid.*

6. Public interest demands that complainants and suitors and their lawful representatives be at liberty to urge, before any legal tribunal having authority to decide, all matters relevant to the questions to be decided. *Ibid.*

7. In order to bring a witness, counsel, or party in a litigation within the rule of absolute privilege, it is only necessary to show that the alleged slanderous or libelous words, at the time when made or published, were clearly relevant to the pending legal inquiry in which they were uttered or used. *Ibid.*

8. In a complaint for libel based upon statements in an affidavit used by defendant upon a motion for a new trial in another action, allegations charging defendant with bad faith in presenting such affidavit, with lack of reasonable belief in the truth thereof, and with knowledge that it was false and malicious, do not suffice to deprive defendant of the defense of absolute privilege if the affidavit was in fact relevant to such motion. *Ibid.*

9. In legal proceedings, if the matter be relevant but false in fact, the law undertakes to punish for perjury, but civil damages are not recoverable. If irrelevant, false, and uttered or published with express malice or without any *bona fide* belief in its truth or relevancy, damages may be recovered in a civil action. *Ibid.*

10. Where, in an action against a railway company by the widow of an employee whose death is alleged to have been caused by negligence, plaintiff recovered a verdict based largely upon the testimony of one man, an affidavit for a new trial impugning the character of the plaintiff for chastity, particularly in respect to her relations with such witness, was relevant as tending to show a motive on his part for falsifying, and, whether or not it was false or presented in bad faith, was absolutely privileged. *Ibid.*

LICENSES. See INTOXICATING LIQUORS. MUNICIPAL CORPORATIONS, 29–33.

LIENS.

Foreclosure: Laches: Judgment.

1. One claiming a mechanic's lien is bound to prosecute his foreclosure action in good faith and with reasonable diligence in order to preserve his lien against subsequent purchasers in

good faith, for value, without notice of his claim. *Glass v. Zachow*, 21

2. By his laches in not promptly prosecuting his claim and filing notice of *lis pendens*, plaintiff in this case waived his lien as against purchasers of the land in good faith without actual notice of his claim. *Ibid.*

3. The provision in sec. 3324, Stats., that the judgment in an action to foreclose a lien shall direct a sale of the interest of the owner or any interest which may have been acquired by any person claiming under him after the commencement of the work or the furnishing of materials, does not prevent such a waiver. *Ibid.*

LIFE ESTATES. See WILLS, 3–10.

LIMITATION OF ACTIONS. See APPEAL, 1, 2.

LIS PENDENS.

See JUDGMENT, 4. LIENS, 2.

The filing of the summons and complaint in an action affecting the title to real estate, without the filing of notice of *lis pendens* as provided in sec. 3187, Stats., is not constructive notice to subsequent purchasers or incumbrancers. *Glass v. Zachow*, 21

LOGS AND TIMBER.

See TRESPASS, 2.

1. An option, given to the purchaser of standing timber, for an extension of the time for removal thereof upon payment of a certain sum, being coupled with an obligation to pay taxes on the land, was not a mere naked option; and no time for its exercise being specified it might be exercised and the money paid within a reasonable time after the expiration of the right to remove. *Gotham v. Wachsmuth L. Co.* 442

2. An exercise of such option within eleven days after the expiration of the right to remove the timber was within a reasonable time. *Ibid.*

LOST PROPERTY: Value. See EVIDENCE, 1.

MANDAMUS. See INTOXICATING LIQUORS, 2.

MARRIAGE. See DIVORCE. WILLS, 1.

MARRIED WOMEN. See HUSBAND AND WIFE.

MASTER AND SERVANT.

The relation: When exists. See WORKMEN'S COMPENSATION ACT, 1, 2.

1. The relation of master and servant may extend beyond the hours the servant is actually required to labor, and in some instances to places other than the premises where the servant is employed. *Milwaukee v. Althoff*, 68

Master's liability for injuries to servant. See WORKMEN'S COMPENSATION ACT.

Same: Unlawful employment of children. See RAILROADS, 36–38.

Same: Liability of officers of corporation.

2. In an action for personal injuries brought by an employee against a corporation and the president and manager thereof, the com-

plaint is *held* to state a cause of action against such individual defendant. *Maahs v. Antigo L. Co.* 1

Same: Unsafe working place. See APPEAL, 19.

3. In an action by a member of a crane crew for injuries alleged to have been sustained through slipping on the icy floor of a flat car upon which defendant operated a steam crane, the complaint is *held*, on demurrer, to show negligence of the defendant in failing to make the place of employment as free from danger as the nature of the employment would reasonably permit (sec. 2394—48, and sub. 11, sec. 2394—41, Stats. 1911), and not to show contributory negligence as a matter of law. *Murphy v. Interlake P. & P. Co.* 9

4. Secs. 2394—48, 2394—49, Stats. (Laws of 1911, ch. 485), are applicable to all employers and all employees in this state, except those expressly exempted from their operation, and impose an absolute duty upon the employer to make the place of employment as free from danger as the nature of the employment will reasonably permit, and not to permit the employee to work in an unsafe place. *Langos v. Menasha Paper Co.* 418

5. If this duty is not performed and injury is caused thereby to the employee, the liability of the master follows as a matter of course, in the absence of contributory negligence on the part of the employee. *Ibid.*

6. Where a millwright employed in a paper mill was directed to repair a felt guide above the rolls of a drying machine, and undertook to do it while the machine was in motion, the superintendent and manager of the mill both being present and knowing how the work was being done and not objecting thereto or taking any steps to stop the machine, which could readily have been stopped without seriously interrupting the business, the jury were warranted in finding an omission of the statutory duty. *Ibid.*

7. In such case, the conduct of the millwright in mounting the machine to make the repair while it was in motion, and the fact that he might have had the machine stopped but failed to do so, so far as they tend to show assumption of the risk on his part, were immaterial, since assumption of the risk is no defense under the statute. *Ibid.*

8. Upon the evidence in this case it was a question for the jury whether such millwright was guilty of contributory negligence, either in attempting to make the repair with the machine in motion, or in the way he descended from his position on the machine, during which descent his hand was caught between the rollers. *Ibid.*

9. In an action by an employee of a sugar company who was injured by a railway car which was pushed in upon a track laid in a narrow alley in which he was at work shoveling beets into defendant's bins, the evidence is *held* to sustain a finding by the jury that the sugar company was negligent in failing to provide a reasonably safe place to work. *Hollenbeck v. Chippewa Sugar Co.* 317

10. Evidence that the employees of the railway company engaged in moving loaded cars upon such track had no lookout upon a car which was being pushed in ahead of the engine at the rate of six or eight miles per hour, and gave no warning of its ap-

proach to the employees of the sugar company working upon the track, was sufficient to sustain a finding of actionable negligence against such railway company. *Ibid.*

11. Upon the evidence in such case the question of plaintiff's contributory negligence was one for the jury. *Ibid.*

Same: Unsafe appliances and places. See RAILROADS, 34–39.

12. If an appliance or place of work is obviously dangerous, not even a general custom—much less, a few exceptional cases—will absolve the master from liability for an injury to a servant. *Emberg v. G. N. R. Co.* 396

Same: Unguarded machinery, shafting, etc. See APPEAL, 10.

13. Plaintiff, an oiler, while filling a grease cup was injured by being caught by a projecting set-screw on a revolving shaft. Upon the evidence, including proof as to custom, it is *held* that in standing where he did he was not guilty of contributory negligence as a matter of law. *Janiak v. Milwaukee Western F. Co.* 544

14. The defense of assumption of risk in such a case has been abolished by sec. 1636*jj*, Stats.; and even though there was such assumption by plaintiff he was not necessarily guilty of contributory negligence. *Ibid.*

15. Evidence that former employees of defendant had stood where plaintiff did in oiling was competent to show that the set-screw was so located as to be dangerous to employees in the discharge of their ordinary duties, as well as upon the issue of where employees, to the knowledge of defendant, ordinarily stood when oiling. *Ibid.*

16. In an action for injuries sustained by an employee while making samples upon a creasing machine in a paper-box factory, a finding by the jury to the effect that it was not the plaintiff's duty, but that of some other employee, to place upon the machine the guard which defendant had provided but which was not in place at the time of the accident, is *held* not to be contrary to such an overwhelming weight of evidence as would justify this court in setting it aside. *Botorowicz v. Kieckhefer B. Co.* 562

17. But the evidence that it was not reasonably practicable to use the machine for making samples with the guard upon it, is *held* to be of such weight and so reinforced by the physical facts and the reasonable probabilities and inferences that it is overwhelming; and a finding of the jury to the effect that defendant was negligent in requiring the plaintiff to use the machine for that purpose without a guard was unwarranted and should be set aside. *Ibid.*

Same: Building appliances: Elevated bridge.

18. Although sec. 1636—81, Stats., imposes upon the employer an absolute duty to see that the specified building appliances are safe and are such as to give proper protection to the life and limbs of his employees, it does not make him an absolute insurer of the safety of such employees. It is intended to secure their safety as regards all reasonable probabilities, but not all possibilities, of personal injury. *Kendzewski v. Wausau S. F. Co.* 452

19. Where an elevated way or bridge between two buildings, made for the use of masons, was five feet in width and supplied on

each side with a guard rail, firmly fixed, from three and one-half to four feet above the floor, the legislative standard of safety was met, and a finding by the jury that it was unsafe because of the want of a second guard rail below the one in place was unwarranted and was properly set aside or changed by the court. *Ibid.*

20. The facts that the way was uncovered, that the floor was out of level to the extent of an inch and a half, and that it was slippery from the formation of ice thereon the night previous, did not show that a second guard rail was necessary or warrant a finding that the contrivance was unsafe. *Ibid.*

21. The ordinary slipperiness of the walk being a thing as well within the anticipation of the employee as of the employer, and on the particular occasion more likely to be within his knowledge, the risk therefrom must be deemed to have been assumed by him. *Ibid.*

22. A mere supervising or administrative direction to an employee requiring the use of such elevated way or bridge, given by one not so situated as to know the slippery condition of the walk, was not such a command as to amount to coercion or to lull an ordinary person into a sense of security, and would not absolve the employee from assumption of the risk. *Ibid.*

Same: Orders of employer. See MASTER AND SERVANT, 22.

23. For the purpose of demonstrating the efficiency of its fire-extinguishing system, defendant's superintendent directed plaintiff, a blacksmith in defendant's employ, to hold a nozzle, about eighteen inches long, attached to twenty-five feet of fire hose. When the water was turned on, the nozzle was jerked out of his hands by the pressure, and struck and injured his shin. The evidence as to the knowledge which the superintendent and plaintiff respectively had as to the conditions, the power to be applied, and the natural action of the water, is *held* to sustain findings by the jury that the superintendent was negligent in directing plaintiff to hold the nozzle alone, and that plaintiff was not guilty of contributory negligence. *Hilden v. Great Lakes C. & D. Co.* 205

Same: Fellow-servants: Incompetency.

24. Employees of the same master, each handling boards, one throwing from the pile and the other picking up the boards and loading them upon a wagon, were fellow-servants, although under the immediate direction of different subordinate foremen. *Szeliwicki v. Connor L. & L. Co.* 286

25. A servant may be incompetent because of physical or mental incapacity to perform the particular work to which he is assigned, with safety to himself and others. Incompetency may arise from mere youth, from inexperience, lack of practice, or habitual negligence. *Ibid.*

26. The court will not take judicial notice that pushing or dropping boards from a lumber pile so as to strike the boards which men below are carrying away is an act necessarily dangerous to others or culpably negligent; and proof of several such occurrences in the course of a day's work is insufficient of itself to support a verdict that the employee was habitually negligent and therefore incompetent to do the simple work of taking down a lumber pile. *Ibid.*

27. Proof that such acts were followed by a warning from the foreman to be careful and not to hurt anybody, with no evidence that the conduct was persisted in thereafter and no particular description of the acts done, while it has a probative quality as respects notice to the employer, falls short of establishing incompetency of the employee on the ground of habitual negligence. *Ibid.*

Same: Assumption of risk. See MASTER AND SERVANT, 7, 14, 21, 22, 29.

Same: Contributory negligence. See APPEAL, 20. MASTER AND SERVANT, 3, 5, 7, 11, 14, 21–23.

28. Where an injured employee had two obviously safe ways of performing a duty, and voluntarily chose an obviously dangerous way instead, a finding that he was guilty of contributory negligence was justified. *Dixon v. Russell,* 161

29. In an action for a personal injury, evidence that defendants had promised the plaintiff to cover the gearing by which he was injured was properly excluded, since the defense of assumption of risk has been abolished by statute (sec. 1636*jj*, Stats. 1913) and the evidence was not material upon the issue of contributory negligence. *Ibid.*

Same: Evidence: Statements by injured servant. See EVIDENCE, 4.

Same: Settlement of claim.

30. Evidence which tended to show that a settlement of plaintiff's claim agreed upon between the parties was conditional upon approval thereof and payment of the amount by an employers' liability insurance company, but which failed to show such approval or that the insurer paid the sum agreed upon on account of plaintiff's injury, is *held* insufficient to show a settlement agreement. *Maahs v. Antigo L. Co.* 1

Same: Employers' liability insurance: Cancellation of policy: Rights in money paid.

31. There being no contractual relation between injured employees and a liability insurance company which has issued a policy to the employer, such company and the employer may agree to the surrender and cancellation of the policy on such terms as they see fit. *Maahs v. Antigo L. Co.* 1

32. Where several actions by injured employees were pending when the employer and a company which had insured against such liability made an agreement whereby, upon payment of a certain sum to the employer, the policy was canceled, but there was nothing in the agreement whereby the money so paid was impressed with any trust in favor of any one, the plaintiff in one of said actions was not entitled to recover on the theory that a part of such money rightfully belonged to him. *Ibid.*

Same: Injury through tort of another: Remedies of servant. See WORKMEN'S COMPENSATION ACT, 2.

Same: Assignment of cause of action against third person: By whom enforced. See WORKMEN'S COMPENSATION ACT, 3.

Liability for injuries to third persons. See NEGLIGENCE, 6. SEARCHES.

MAXIMS.

Tempus enim modus tollendi obligationes et actiones, 225.
There is no wrong without a remedy, 413, 417.
Ubi jus, ibi remedium, 512.

MEASURE OF DAMAGES. See BRIDGES, 3. SALES, 11, 13. SEARCHES, 1. VENDOR AND PURCHASER, 5.

MECHANICS' LIENS. See LIENS.

MEDICAL EXPERTS. See EVIDENCE, 8, 9.

MENTAL SUFFERING. See SEARCHES.

MINORS. See INFANTS.

MISTAKE. See COURTS, 2. REFORMATION OF INSTRUMENTS.

MORTGAGES. See CANCELLATION OF INSTRUMENTS. CONTRACTS, 4. PRINCIPAL AND AGENT, 4, 5.

MOTIONS. See COSTS, 8. PLEADING, 6.

MUNICIPAL CORPORATIONS.

Ordinances: Grants of franchises, etc. See STATUTES, 13. STREET RAILWAYS, 1–10.

1. In case of a city ordinance being ambiguous, in that, read literally, or from some permissible viewpoint, the legislative body evinced gross carelessness in conserving the public interests, it is to be presumed there was no such purpose, and that should prevail if, by any reasonable construction, a cast can be given to the enactment consistent with due care. *Madison v. Southern Wis. R. Co.* 352

2. In general, in case of a public utility franchise being reasonably susceptible of two meanings, giving rise to uncertainty as to which was intended, the language used should be construed favorably to the public interests. *Ibid.*

Same: Authority to enact police regulations. See MUNICIPAL CORPORATIONS, 29–33.

Sale of property.

3. A city advertised for sale its "old garbage plant," "the entire building, including all its machinery, boilers, etc." Plaintiff purchased and by written contract the city sold to him "the said old garbage plant . . . including the building and machinery therein, switchboard and engines appurtenant and belonging thereto and being a part thereof." A finding of the civil court that two certain steam engines, two generators, and a switchboard, though located in a separate building, were a part of the "old garbage plant" and became plaintiff's property, is *held* to be based on sufficient evidence. *Grant v. Milwaukee,* 635

4. The razing or wrecking of the plant and removal of the machinery and material, which plaintiff agreed to do, was a necessary incident to the sale, and not a "public work or improvement" for which plans and other formal steps were required, as conditions precedent, by the city charter. *Ibid.*

Contracts: Fraud. See APPEAL, 17.

Same: Recovery of money paid on illegal contract. See MUNICIPAL CORPORATIONS, 35.

Public improvements: Viaducts: Assessment of damages, etc.

5. Ch. 376, Laws of 1901, which provides that "if any damages shall be sustained by the owners of abutting property" by reason of the construction of a viaduct, "such damages shall be ascertained and determined in the manner provided by law for the determination and assessment of damages for the alteration of the grade of a street," entitles the abutting owners to recover

such damages regardless of whether or not the construction of the viaduct effects a change in the established grade of a street. *Bagnall v. Milwaukee*, 642

6. The term "abutting property" in said act includes property abutting on the street upon which the viaduct is constructed, in a case where the structure occupies the street on both sides of the center, although it does not cover the whole street. *Ibid.*

7. In the ascertainment of damages under said act all of the provisions of the city charter relating to the assessment of benefits and damages for the alteration of established grades apply. *Ibid.*

8. Evidence having been admitted without objection respecting a sale of property in the vicinity of one parcel in question five years after the completion of the viaduct, the refusal of the trial court to strike it out on defendant's motion was not prejudicial error, especially where the jury found no damages as to such parcel. *Ibid.*

9. The questions submitted to the jury being the market value of plaintiff's property immediately before the commencement of the viaduct and immediately after its completion, it was not error to refuse to instruct them to eliminate from their consideration depreciation in market value brought about by diversion of traffic by the viaduct. *Ibid.*

10. A requested instruction to the effect that the jury should weigh and offset any benefits to plaintiff's property against the damages was not applicable to the questions submitted and was properly refused. *Ibid.*

11. A refusal to instruct on loss of profits was proper where the property was vacant and there was no evidence on the subject of profits. *Ibid.*

12. There was no prejudicial error in refusing to instruct the jury that they should exclude from consideration any loss or difficulty of access from plaintiff's property to the street or the viaduct therein. *Ibid.*

13. Following *Filer & Stowell Co. v. Milwaukee*, 146 Wis. 221, and *Pabst B. Co. v. Milwaukee*, 148 Wis. 582, it is *held* that there was no error in refusing to order a reassessment of benefits and damages under the provisions of secs. 1210*d* and 1210*e*, Stats. *Ibid.*

Same: Harbor improvements: Eminent domain. See NAVIGABLE WATERS, 10, 11.

14. *It would seem* that the provision in sec. 30, ch. VI, of the Milwaukee city charter giving the common council power to change the location of any water channel or slip and the location and direction of any river, in view of the connection in which it is found and the reference in the same section to ch. 129, Laws of 1873, relates to the Kinnickinnic river so far as made a public river under said ch. 129, and not otherwise. *State ex rel. Thomas F. Co. v. Milwaukee*, 549

15. In a proceeding to take land for the improvement of the Kinnickinnic river, it appearing that dock lines had been previously established at the place in question under sec. 20, ch. 129, Laws of 1873, or at least that there had been an attempt at compliance with that act,—it follows that the city has power under its charter to take land for the widening of the channel of that river. *Ibid.*

16. Where the particular improvement contemplated is such an one as is provided for in secs. 926—108 to 926—113, Stats., those sections must be complied with, and, because they relate to the particular subject, must have controlling force and effect. *Ibid.*

17. The words of sec. 926—108, "a complete system of waterways, canals, slips, revetments, docks and bridges intended to be constructed or improved," were not intended to leave the question of the completeness of the system to the determination of a court or jury, but they mean a system completely outlined so far as intended to be constructed and so far as agreed upon between the city and the federal government. *Ibid.*

18. Such a complete system was settled upon and determined when the representatives of the federal government approved the plans for the improvement of the Kinnickinnic river proposed by the city officials. *Ibid.*

19. The requirements of sec. 926—110, that the plan when approved shall be filed in the office of the board of public works and a duplicate recorded with the register of deeds, and that the common council shall thereupon promptly and permanently locate by ordinance all dock lines and revetments in conformity thereto, are substantial, not merely directory; and the riparian owners have the right to insist that the commands of the statute in this respect be followed. *Ibid.*

20. The changes referred to in sec. 926—110, required to meet the approval of the federal government, are to be made before the establishment of the permanent dock lines. *Ibid.*

21. After the permanent dock lines are once established with the approval of the federal government, the city is impliedly prohibited from changing them, and the taking of land inside of such dock lines is contrary to the purposes of the act and unauthorized. *Ibid.*

22. The reference in the act of Congress of June 25, 1910, to House Document No. 667, which was accompanied by a map on which were indicated in red certain localities "where dredging is to be done," which points were inside the then established dock lines, did not have the effect to change such dock lines or to confer on the city the power to take the lands for that purpose. *Ibid.*

23. The city acquires its power of eminent domain by delegation from the state, not from the United States. *Ibid.*

24. Where the petition for condemnation shows that the power of eminent domain is invoked under and pursuant to secs. 926—108 to 926—113, Stats., for the purpose and in aid of the project there mentioned, the map and survey accompanying the same should correspond on its land side with the permanent dock line established in the manner therein provided, otherwise the proceeding will be void. *Ibid.*

25. Whatever general power of condemnation the city of Milwaukee may have under its charter is restrained in its exercise, limited, and qualified by secs. 926—108 *et seq.*, when it is exercised in the particular case there mentioned. *Ibid.*

Same: Enforcement of assessments.

26. Ch. 71, Laws of 1901 (secs. 926—135 to 926—138, Stats.), does not apply to the city of Milwaukee, since the charter of that city authorizes it to enforce special assessment certificates

issued to contractors and others "by separate sale of the lands affected thereby under the authority of the city." *State ex rel. City Const. Co. v. Kotecki*, 278

27. The words "separate sale" in sec. 926—135, Stats., do not mean a sale for the delinquent special assessment separate and apart from the sale for other delinquent city taxes, but a sale by the city treasurer under authority of the city separate from the sale made by the county treasurer under the general statutes. *Ibid.*

28. The provision in sec. 926—135, Stats., for filing the special assessment certificates with the comptroller in cities of the first class merely related to the mode of getting the certificates into the tax roll and within the power of collection and sale by the city treasurer, and effected no change so far as a sale by the city treasurer separate from the county sale was involved. *Ibid.*

Police power and regulations: Public dances and dance halls. See CONSTITUTIONAL LAW, 1–8.

29. The grant of discretionary power to the common council by sec. 3, ch. IV, Milwaukee Charter, to enact such ordinances "for the government and good order of the city— . . . for the suppression of vice—for the prevention of crime— . . . as they shall deem expedient," etc., plainly confers authority to legislate in respect to public dances and dance halls. *Mehlos v. Milwaukee*, 591

30. An ordinance requiring, among other things, that every public dance hall shall obtain a license annually; that no such license shall be issued until it shall be found that the hall complies with and conforms to all ordinances, health and fire regulations of the city, is properly ventilated and supplied with toilet conveniences, and is a safe and proper place for the purpose; that the license may be canceled for causes stated; and that no public dances or balls shall be held until after being reported to the mayor and approved by him, is reasonable and does not violate any of the guaranties of the federal constitution. *Ibid.*

31. Where, under such an ordinance, the mayor must refer all applications for dance-hall licenses to the chief of police for an investigation as to whether the place satisfies all the requirements of the ordinance, and such officer may call to his assistance three other city officials, and must make a written report to the mayor accompanied by his opinion as to whether the application should be granted or refused, the ordinance cannot be held void on the ground that it clothes the mayor with arbitrary power to grant or refuse the license. *Ibid.*

32. Nor is such an ordinance rendered void by the fact that power to revoke the license is lodged with the mayor, where the grounds of revocation are clearly specified and the ordinance clearly, by implication, provides that the mayor in performing his duties shall proceed as a *quasi*-judicial tribunal. *Ibid.*

33. A provision in such an ordinance giving authority to certain police officials to put an end, summarily and without a hearing, to a public dance in case of the violation of the ordinance, the commission of any indecent act, or the happening of any disorder of a gross, violent, or vulgar character, is a reasonably necessary and a proper provision. *Ibid.*

Same: Liquor licenses: Transfer. See INTOXICATING LIQUORS.

Streets: Grant of use "when opened." See STREET RAILWAYS, 2.

Same: Paving of street railway zone: Regulation. See STREET RAILWAYS, 4–10.

Same: Permit for temporary sidewalk: Injuries. See NEGLIGENCE, 7.

Same: Defective sidewalk: Injury. See WORKMEN'S COMPENSATION ACT, 2.

Fiscal management: Settlement with town. See JUDGMENT, 7.

Taxation: Tax levies.

34. Ch. 606, Laws of 1913,—providing for the levy, in cities of the first class, of a tax of one-tenth of a mill for the purpose of extinguishing a deficit in the city treasury from nonpayment of taxes in previous years, and of another one-fourth of a mill for a so-called readjustment fund,—did not require such taxes to be included in the general tax levy of 1913, which had, before the passage of said act, been rightfully delimited by the adoption of a budget under then existing laws. The legislative intention was that said ch. 606 should supplement and perfect ch. 312, Laws of 1913, and that the two acts should take effect simultaneously with the creation of the budget and the levy of the taxes of 1914. *State ex rel. Beitz v. Bading,* 140

Actions: Recovery of money paid on illegal contract: Laches.

35. The fact that an action by a city to recover money paid by it on an illegal contract was not brought until more than two years after the payment did not necessarily show laches precluding a recovery, it not appearing that the delay operated in any way to defendant's disadvantage. *Fond du Lac v. Barber A. P. Co.* 471

Same: Violations of ordinances: Assault and battery. See CRIMINAL LAW.

NAVIGABLE WATERS.

Public rights: Hunting and fishing: Riparian owners.

1. Navigable waters in this state are public waters, and the policy which, in the ordinance of 1787, in the enabling act of 1846, and in the state constitution, reserved to the people the full and free use of public waters should not be limited or curtailed by narrow construction but should be interpreted in the broad and beneficent spirit that gave rise to it. *Diana Shooting Club v. Husting,* 261

2. Riparian owners on navigable streams in this state have only a qualified title to the beds of such streams, which title is entirely subordinated to, and not inconsistent with, the right of the state to secure and preserve to the people the full enjoyment of navigation and the rights incident thereto. *Ibid.*

3. The right of the public to hunt on the navigable streams of this state is, like the right to fish in such streams, an incident of the right of navigation. *Ibid.*

4. Hunting on navigable waters is lawful when it is confined strictly to such waters while they are in a navigable stage, and between the boundaries of ordinary high-water marks; and when so confined it is immaterial what the character of the stream or water is, whether deep or shallow, clear or covered with aquatic vegetation. *Ibid.*

5. By ordinary high-water mark is meant the point on the bank or shore up to which the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristic. *Ibid.*

6. Where the bank or shore at any particular place is of such a character that it is impossible or difficult to ascertain where the point of ordinary high-water mark is, recourse may be had to other places on the bank or shore of the same stream or lake to determine whether a given stage of water is above or below ordinary high-water mark. *Ibid.*

[7. Whether the public has a right to hunt between ordinary high-water marks on a navigable stream which, owing to a low stage of water, is unnavigable, or on land between such marks which has become dry or exposed, not decided.] *Ibid.*

Federal control: River harbors: Improvement: Ownership of river bed, etc.: Condemnation. See MUNICIPAL CORPORATIONS, 14–25.

8. Under the commerce clause of the federal constitution the United States has a certain control over navigation and its incidents, including improvements of navigable rivers and bridges spanning the same. This is paramount to but not exclusive of state control of the subject, which is much broader and extends to many regulations with which the federal government does not concern itself. *State ex rel. Thomas F. Co. v. Milwaukee,* 549

9. Where money is appropriated by Congress for the improvement of a harbor, subject to the condition that the plans therefor shall be approved by the federal government, the form and manner of approval are matters for the administrative department of that government. *Ibid.*

10. The mere fact that land sought to be condemned by a city for the improvement of its river harbor was to be conveyed to the United States as a condition of receiving a federal appropriation, did not affect the right of the city to take the property. The city would acquire only an easement, and a conveyance by it, even though expressly authorized by the state legislature, would not confer proprietory rights upon the United States nor in any way impair the authority of the city or the state over the new river bed. *Ibid.*

11. In the original river bed there were three interests: (1) that of the riparian proprietor, who held a qualified title; (2) paramount to this the public interest represented by the state, for the purposes of navigation or improvement; and (3) paramount to these two the governmental or sovereign interest of the United States which it might exert in aid of navigation or other incident of interstate commerce; and the enlarged bed created by condemnation proceedings has the same legal status as the former river bottom. *Ibid.*

NEGLIGENCE.

See HIGHWAYS. INSTRUCTIONS TO JURY, 3. LANDLORD AND TENANT, 12, 13. MASTER AND SERVANT, 2–29. PLEADING, 1. RAILROADS, 12–39. STREET RAILWAYS, 11, 12.

Objects attractive to children: Dangerous acts: Custom.

1. It was not an obviously dangerous act to leave uncovered and unfenced a mortar box filled with lime and water over which

was spread a thin layer of sand, where such box was upon private property near a building which was being erected and so far from the sidewalk as not to affect travel thereon or be a source of danger to those who remained on the sidewalk or street, even though the box and a neighboring sandpile were attractive to children, who were in the habit of playing about the place. *Zartner v. George*, 131

2. It appearing that it was customary and even necessary at that season of the year to leave mortar boxes in which lime was slacking in the condition in which the box in question was left, a verdict for defendants was properly directed in an action for injury to a boy about seven years old who went upon the premises to play, jumped into the box, and sustained serious burns on his feet from the hot lime. *Ibid.*

3. Liability for injury to trespassers on private property should be limited to cases where the act complained of partakes of the nature of gross negligence, obviously endangering the safety of others, or to active negligence committed at the time of injury. *Ibid.*

4. The owner of private premises may safely, so far as trespassers are concerned, engage in any lawful ordinary work thereon and conduct it in a customary manner without incurring liability, even though some danger to them may reasonably be anticipated from the condition of the premises created by so conducting his work. *Ibid.*

Operations dangerous to children.

5. If a person lawfully conducts operations in a place and manner liable to imperil the safety of children of tender years rightfully in the vicinity, and such children are or may be reasonably expected to be lawfully there, he owes to them the duty of exercising ordinary care to protect them from such peril. *Webster v. Corcoran Bros. Co.* 576

6. Defendant's servants, by means of a rope and tackle operated by horses, were raising sacks of oats from a wagon standing in an alleyway to the third story of a barn. Plaintiff, about eight years old, and other boys had been playing with the rope and had been ordered away, but remained near by. A kink having formed in the rope, plaintiff was told by the driver of the horses to straighten it out. As he took hold of the rope near a pulley, the driver negligently started the horses and plaintiff's hand was drawn into the pulley and injured. The jury found that defendant's servants did not exercise ordinary care to prevent plaintiff from incurring danger from handling the rope. *Held*, that the defendant was liable for the injury. *Ibid.*

Riding bicycle in school grounds: Injury to child. See NEGLIGENCE, 12.

Dangerous temporary sidewalk.

7. No permit from municipal authorities for the temporary use of a street for building purposes can justify the construction or maintenance of a temporary sidewalk in a manner dangerous to pedestrians. *Fuhrmann v. Coddington E. Co.* 650

8. Upon evidence tending to show that a temporary walk built in the street by a building contractor was only twenty-five inches wide at the place of accident, that a considerable part of this

would be covered by the overhang of a passing street car, and that crushed stone piled on the other side between the walk and curb overflowed upon the walk and at time shoved it over nearer the street-car track, the jury were warranted in finding negligent construction or maintenance of such walk. *Ibid.*

9. Whether such negligence was the proximate cause of an injury to the plaintiff who, while using such walk, was struck by a street car coming from behind him, and whether in using the walk he was guilty of contributory negligence, were in this case questions for the jury. *Ibid.*

Dangerous obstruction over switch track.

10. The questions whether a manufacturing company was negligent in leaving a movable bridge or runway of planks across a switch track in its yard, and whether the foreman of a switching crew who was injured by coming in contact therewith while he was riding at night upon the footboard of a switch engine was guilty of contributory negligence, are *held*, upon the evidence, to have been for the jury. *Landry v. Webster Mfg. Co.* 248

Pleading: Sufficiency of complaint.

11. A complaint need not negative contributory negligence on the part of the plaintiff, that being defensive matter. *Paradies v. Woodard*, 243

12. A complaint alleging in substance that defendant, a boy between thirteen and fourteen years old, drove and rode a bicycle upon which another boy was riding with him, thus making it more difficult to manage and more dangerous, in the playgrounds of a public school where such riding was expressly forbidden, at such a speed, without warning, and with such want of ordinary care that he knocked down, ran over, and injured the plaintiff, is *held*, on demurrer, to state a cause of action. *Ibid.*

Evidence of custom.

13. Where an act which was not obviously dangerous but which resulted in injury is alleged to have been negligent, evidence of custom is admissible for the purpose of showing whether or not the act was done as it is usually done under the same or similar circumstances, and thus to aid in determining its character. *Zartner v. George*, 131

14. In such case it is not necessary that either party should have known what the custom was at the time the alleged negligent act was done. *Ibid.*

Contributory negligence. See HIGHWAYS, 3. INSTRUCTIONS TO JURY, 3. MASTER AND SERVANT, 3, 5, 7, 11, 13, 14, 21–23, 28, 29. NEGLIGENCE, 9–11. RAILROADS, 14, 26–32, 38. STREET RAILWAYS, 12.

NEGOTIABLE INSTRUMENTS. See CANCELLATION OF INSTRUMENTS. FRAUDS, STATUTE OF, 1–6. INSANE PERSONS, 2. PRINCIPAL AND AGENT, 4, 5.

NEW TRIAL. See APPEAL, 4, 5, 13–15, 18, 19. EJECTMENT, 4–8. JUDGMENT, 7.

NOMINAL DAMAGES. See DAMAGES, 1, 2.

NOTICE.
Of appeal. See APPEAL, 6.
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Of election. See ELECTIONS. PUBLIC UTILITIES, 2.

each side with a guard rail, firmly fixed, from three and one-half to four feet above the floor, the legislative standard of safety was met, and a finding by the jury that it was unsafe because of the want of a second guard rail below the one in place was unwarranted and was properly set aside or changed by the court. *Ibid.*

20. The facts that the way was uncovered, that the floor was out of level to the extent of an inch and a half, and that it was slippery from the formation of ice thereon the night previous, did not show that a second guard rail was necessary or warrant a finding that the contrivance was unsafe. *Ibid.*

21. The ordinary slipperiness of the walk being a thing as well within the anticipation of the employee as of the employer, and on the particular occasion more likely to be within his knowledge, the risk therefrom must be deemed to have been assumed by him. *Ibid.*

22. A mere supervising or administrative direction to an employee requiring the use of such elevated way or bridge, given by one not so situated as to know the slippery condition of the walk, was not such a command as to amount to coercion or to lull an ordinary person into a sense of security, and would not absolve the employee from assumption of the risk. *Ibid.*

Same: Orders of employer. See MASTER AND SERVANT, 22.

23. For the purpose of demonstrating the efficiency of its fire-extinguishing system, defendant's superintendent directed plaintiff, a blacksmith in defendant's employ, to hold a nozzle, about eighteen inches long, attached to twenty-five feet of fire hose. When the water was turned on, the nozzle was jerked out of his hands by the pressure, and struck and injured his shin. The evidence as to the knowledge which the superintendent and plaintiff respectively had as to the conditions, the power to be applied, and the natural action of the water, is *held* to sustain findings by the jury that the superintendent was negligent in directing plaintiff to hold the nozzle alone, and that plaintiff was not guilty of contributory negligence. *Hilden v. Great Lakes C. & D. Co.* 205

Same: Fellow-servants: Incompetency.

24. Employees of the same master, each handling boards, one throwing from the pile and the other picking up the boards and loading them upon a wagon, were fellow-servants, although under the immediate direction of different subordinate foremen. *Szeliwicki v. Connor L. & L. Co.* 286

25. A servant may be incompetent because of physical or mental incapacity to perform the particular work to which he is assigned, with safety to himself and others. Incompetency may arise from mere youth, from inexperience, lack of practice, or habitual negligence. *Ibid.*

26. The court will not take judicial notice that pushing or dropping boards from a lumber pile so as to strike the boards which men below are carrying away is an act necessarily dangerous to others or culpably negligent; and proof of several such occurrences in the course of a day's work is insufficient of itself to support a verdict that the employee was habitually negligent and therefore incompetent to do the simple work of taking down a lumber pile. *Ibid.*

27. Proof that such acts were followed by a warning from the foreman to be careful and not to hurt anybody, with no evidence that the conduct was persisted in thereafter and no particular description of the acts done, while it has a probative quality as respects notice to the employer, falls short of establishing incompetency of the employee on the ground of habitual negligence. *Ibid.*

Same: Assumption of risk. See MASTER AND SERVANT, 7, 14, 21, 22, 29.

Same: Contributory negligence. See APPEAL, 20. MASTER AND SERVANT, 3, 5, 7, 11, 14, 21–23.

28. Where an injured employee had two obviously safe ways of performing a duty, and voluntarily chose an obviously dangerous way instead, a finding that he was guilty of contributory negligence was justified. *Dixon v. Russell,* 161

29. In an action for a personal injury, evidence that defendants had promised the plaintiff to cover the gearing by which he was injured was properly excluded, since the defense of assumption of risk has been abolished by statute (sec. 1636*jj*, Stats. 1913) and the evidence was not material upon the issue of contributory negligence. *Ibid.*

Same: Evidence: Statements by injured servant. See EVIDENCE, 4.

Same: Settlement of claim.

30. Evidence which tended to show that a settlement of plaintiff's claim agreed upon between the parties was conditional upon approval thereof and payment of the amount by an employers' liability insurance company, but which failed to show such approval or that the insurer paid the sum agreed upon on account of plaintiff's injury, is *held* insufficient to show a settlement agreement. *Maahs v. Antigo L. Co.* 1

Same: Employers' liability insurance: Cancellation of policy: Rights in money paid.

31. There being no contractual relation between injured employees and a liability insurance company which has issued a policy to the employer, such company and the employer may agree to the surrender and cancellation of the policy on such terms as they see fit. *Maahs v. Antigo L. Co.* 1

32. Where several actions by injured employees were pending when the employer and a company which had insured against such liability made an agreement whereby, upon payment of a certain sum to the employer, the policy was canceled, but there was nothing in the agreement whereby the money so paid was impressed with any trust in favor of any one, the plaintiff in one of said actions was not entitled to recover on the theory that a part of such money rightfully belonged to him. *Ibid.*

Same: Injury through tort of another: Remedies of servant. See WORKMEN'S COMPENSATION ACT, 2.

Same: Assignment of cause of action against third person: By whom enforced. See WORKMEN'S COMPENSATION ACT, 3.

Liability for injuries to third persons. See NEGLIGENCE, 6. SEARCHES.

MAXIMS.

Tempus enim modus tollendi obligationes et actiones, 225.
There is no wrong without a remedy, 413, 417.
Ubi jus, ibi remedium, 512.

MEASURE OF DAMAGES. See BRIDGES, 3. SALES, 11, 13. SEARCHES, 1. VENDOR AND PURCHASER, 5.

MECHANICS' LIENS. See LIENS.

MEDICAL EXPERTS. See EVIDENCE, 8, 9.

MENTAL SUFFERING. See SEARCHES.

MINORS. See INFANTS.

MISTAKE. See COURTS, 2. REFORMATION OF INSTRUMENTS.

MORTGAGES. See CANCELLATION OF INSTRUMENTS. CONTRACTS, 4. PRINCIPAL AND AGENT, 4, 5.

MOTIONS. See COSTS, 8. PLEADING, 6.

MUNICIPAL CORPORATIONS.

Ordinances: Grants of franchises, etc. See STATUTES, 13. STREET RAILWAYS, 1–10.

1. In case of a city ordinance being ambiguous, in that, read literally, or from some permissible viewpoint, the legislative body evinced gross carelessness in conserving the public interests, it is to be presumed there was no such purpose, and that should prevail if, by any reasonable construction, a cast can be given to the enactment consistent with due care. *Madison v. Southern Wis. R. Co.* 352

2. In general, in case of a public utility franchise being reasonably susceptible of two meanings, giving rise to uncertainty as to which was intended, the language used should be construed favorably to the public interests. *Ibid.*

Same: Authority to enact police regulations. See MUNICIPAL CORPORATIONS, 29–33.

Sale of property.

3. A city advertised for sale its "old garbage plant," "the entire building, including all its machinery, boilers, etc." Plaintiff purchased and by written contract the city sold to him "the said old garbage plant . . . including the building and machinery therein, switchboard and engines appurtenant and belonging thereto and being a part thereof." A finding of the civil court that two certain steam engines, two generators, and a switchboard, though located in a separate building, were a part of the "old garbage plant" and became plaintiff's property, is *held* to be based on sufficient evidence. *Grant v. Milwaukee,* 635

4. The razing or wrecking of the plant and removal of the machinery and material, which plaintiff agreed to do, was a necessary incident to the sale, and not a "public work or improvement" for which plans and other formal steps were required, as conditions precedent, by the city charter. *Ibid.*

Contracts: Fraud. See APPEAL, 17.

Same: Recovery of money paid on illegal contract. See MUNICIPAL CORPORATIONS, 35.

Public improvements: Viaducts: Assessment of damages, etc.

5. Ch. 376, Laws of 1901, which provides that "if any damages shall be sustained by the owners of abutting property" by reason of the construction of a viaduct, "such damages shall be ascertained and determined in the manner provided by law for the determination and assessment of damages for the alteration of the grade of a street," entitles the abutting owners to recover

such damages regardless of whether or not the construction of the viaduct effects a change in the established grade of a street. *Bagnall v. Milwaukee*, 642

6. The term "abutting property" in said act includes property abutting on the street upon which the viaduct is constructed, in a case where the structure occupies the street on both sides of the center, although it does not cover the whole street. *Ibid.*

7. In the ascertainment of damages under said act all of the provisions of the city charter relating to the assessment of benefits and damages for the alteration of established grades apply. *Ibid.*

8. Evidence having been admitted without objection respecting a sale of property in the vicinity of one parcel in question five years after the completion of the viaduct, the refusal of the trial court to strike it out on defendant's motion was not prejudicial error, especially where the jury found no damages as to such parcel. *Ibid.*

9. The questions submitted to the jury being the market value of plaintiff's property immediately before the commencement of the viaduct and immediately after its completion, it was not error to refuse to instruct them to eliminate from their consideration depreciation in market value brought about by diversion of traffic by the viaduct. *Ibid.*

10. A requested instruction to the effect that the jury should weigh and offset any benefits to plaintiff's property against the damages was not applicable to the questions submitted and was properly refused. *Ibid.*

11. A refusal to instruct on loss of profits was proper where the property was vacant and there was no evidence on the subject of profits. *Ibid.*

12. There was no prejudicial error in refusing to instruct the jury that they should exclude from consideration any loss or difficulty of access from plaintiff's property to the street or the viaduct therein. *Ibid.*

13. Following *Filer & Stowell Co. v. Milwaukee*, 146 Wis. 221, and *Pabst B. Co. v. Milwaukee*, 148 Wis. 582, it is *held* that there was no error in refusing to order a reassessment of benefits and damages under the provisions of secs. 1210*d* and 1210*e*, Stats. *Ibid.*

Same: Harbor improvements: Eminent domain. See NAVIGABLE WATERS, 10, 11.

14. *It would seem* that the provision in sec. 30, ch. VI, of the Milwaukee city charter giving the common council power to change the location of any water channel or slip and the location and direction of any river, in view of the connection in which it is found and the reference in the same section to ch. 129, Laws of 1873, relates to the Kinnickinnic river so far as made a public river under said ch. 129, and not otherwise. *State ex rel. Thomas F. Co. v. Milwaukee*, 549

15. In a proceeding to take land for the improvement of the Kinnickinnic river, it appearing that dock lines had been previously established at the place in question under sec. 20, ch. 129, Laws of 1873, or at least that there had been an attempt at compliance with that act,—it follows that the city has power under its charter to take land for the widening of the channel of that river. *Ibid.*

16. Where the particular improvement contemplated is such an one as is provided for in secs. 926—108 to 926—113, Stats., those sections must be complied with, and, because they relate to the particular subject, must have controlling force and effect. *Ibid.*

17. The words of sec. 926—108, "a complete system of waterways, canals, slips, revetments, docks and bridges intended to be constructed or improved," were not intended to leave the question of the completeness of the system to the determination of a court or jury, but they mean a system completely outlined so far as intended to be constructed and so far as agreed upon between the city and the federal government. *Ibid.*

18. Such a complete system was settled upon and determined when the representatives of the federal government approved the plans for the improvement of the Kinnickinnic river proposed by the city officials. *Ibid.*

19. The requirements of sec. 926—110, that the plan when approved shall be filed in the office of the board of public works and a duplicate recorded with the register of deeds, and that the common council shall thereupon promptly and permanently locate by ordinance all dock lines and revetments in conformity thereto, are substantial, not merely directory; and the riparian owners have the right to insist that the commands of the statute in this respect be followed. *Ibid.*

20. The changes referred to in sec. 926—110, required to meet the approval of the federal government, are to be made before the establishment of the permanent dock lines. *Ibid.*

21. After the permanent dock lines are once established with the approval of the federal government, the city is impliedly prohibited from changing them, and the taking of land inside of such dock lines is contrary to the purposes of the act and unauthorized. *Ibid.*

22. The reference in the act of Congress of June 25, 1910, to House Document No. 667, which was accompanied by a map on which were indicated in red certain localities "where dredging is to be done," which points were inside the then established dock lines, did not have the effect to change such dock lines or to confer on the city the power to take the lands for that purpose. *Ibid.*

23. The city acquires its power of eminent domain by delegation from the state, not from the United States. *Ibid.*

24. Where the petition for condemnation shows that the power of eminent domain is invoked under and pursuant to secs. 926—108 to 926—113, Stats., for the purpose and in aid of the project there mentioned, the map and survey accompanying the same should correspond on its land side with the permanent dock line established in the manner therein provided, otherwise the proceeding will be void. *Ibid.*

25. Whatever general power of condemnation the city of Milwaukee may have under its charter is restrained in its exercise, limited, and qualified by secs. 926—108 *et seq.*, when it is exercised in the particular case there mentioned. *Ibid.*

Same: Enforcement of assessments.

26. Ch. 71, Laws of 1901 (secs. 926—135 to 926—138, Stats.), does not apply to the city of Milwaukee, since the charter of that city authorizes it to enforce special assessment certificates

issued to contractors and others "by separate sale of the lands affected thereby under the authority of the city." *State ex rel. City Const. Co. v. Kotecki*, 278

27. The words "separate sale" in sec. 926—135, Stats., do not mean a sale for the delinquent special assessment separate and apart from the sale for other delinquent city taxes, but a sale by the city treasurer under authority of the city separate from the sale made by the county treasurer under the general statutes. *Ibid.*

28. The provision in sec. 926—135, Stats., for filing the special assessment certificates with the comptroller in cities of the first class merely related to the mode of getting the certificates into the tax roll and within the power of collection and sale by the city treasurer, and effected no change so far as a sale by the city treasurer separate from the county sale was involved. *Ibid.*

Police power and regulations: Public dances and dance halls. See CONSTITUTIONAL LAW, 1–8.

29. The grant of discretionary power to the common council by sec. 3, ch. IV, Milwaukee Charter, to enact such ordinances "for the government and good order of the city— . . . for the suppression of vice—for the prevention of crime— . . . as they shall deem expedient," etc., plainly confers authority to legislate in respect to public dances and dance halls. *Mehlos v. Milwaukee*, 591

30. An ordinance requiring, among other things, that every public dance hall shall obtain a license annually; that no such license shall be issued until it shall be found that the hall complies with and conforms to all ordinances, health and fire regulations of the city, is properly ventilated and supplied with toilet conveniences, and is a safe and proper place for the purpose; that the license may be canceled for causes stated; and that no public dances or balls shall be held until after being reported to the mayor and approved by him, is reasonable and does not violate any of the guaranties of the federal constitution. *Ibid.*

31. Where, under such an ordinance, the mayor must refer all applications for dance-hall licenses to the chief of police for an investigation as to whether the place satisfies all the requirements of the ordinance, and such officer may call to his assistance three other city officials, and must make a written report to the mayor accompanied by his opinion as to whether the application should be granted or refused, the ordinance cannot be held void on the ground that it clothes the mayor with arbitrary power to grant or refuse the license. *Ibid.*

32. Nor is such an ordinance rendered void by the fact that power to revoke the license is lodged with the mayor, where the grounds of revocation are clearly specified and the ordinance clearly, by implication, provides that the mayor in performing his duties shall proceed as a *quasi*-judicial tribunal. *Ibid.*

33. A provision in such an ordinance giving authority to certain police officials to put an end, summarily and without a hearing, to a public dance in case of the violation of the ordinance, the commission of any indecent act, or the happening of any disorder of a gross, violent, or vulgar character, is a reasonably necessary and a proper provision. *Ibid.*

Same: Liquor licenses: Transfer. See INTOXICATING LIQUORS.

Streets: Grant of use "when opened." See STREET RAILWAYS, 2.

Same: Paving of street railway zone: Regulation. See STREET RAILWAYS, 4–10.

Same: Permit for temporary sidewalk: Injuries. See NEGLIGENCE, 7.

Same: Defective sidewalk: Injury. See WORKMEN'S COMPENSATION ACT, 2.

Fiscal management: Settlement with town. See JUDGMENT, 7.

Taxation: Tax levies.

34. Ch. 606, Laws of 1913,—providing for the levy, in cities of the first class, of a tax of one-tenth of a mill for the purpose of extinguishing a deficit in the city treasury from nonpayment of taxes in previous years, and of another one-fourth of a mill for a so-called readjustment fund,—did not require such taxes to be included in the general tax levy of 1913, which had, before the passage of said act, been rightfully delimited by the adoption of a budget under then existing laws. The legislative intention was that said ch. 606 should supplement and perfect ch. 312, Laws of 1913, and that the two acts should take effect simultaneously with the creation of the budget and the levy of the taxes of 1914. *State ex rel. Beitz v. Bading,* 140

Actions: Recovery of money paid on illegal contract: Laches.

35. The fact that an action by a city to recover money paid by it on an illegal contract was not brought until more than two years after the payment did not necessarily show laches precluding a recovery, it not appearing that the delay operated in any way to defendant's disadvantage. *Fond du Lac v. Barber A. P. Co.* 471

Same: Violations of ordinances: Assault and battery. See CRIMINAL LAW.

NAVIGABLE WATERS.

Public rights: Hunting and fishing: Riparian owners.

1. Navigable waters in this state are public waters, and the policy which, in the ordinance of 1787, in the enabling act of 1846, and in the state constitution, reserved to the people the full and free use of public waters should not be limited or curtailed by narrow construction but should be interpreted in the broad and beneficent spirit that gave rise to it. *Diana Shooting Club v. Husting,* 261

2. Riparian owners on navigable streams in this state have only a qualified title to the beds of such streams, which title is entirely subordinated to, and not inconsistent with, the right of the state to secure and preserve to the people the full enjoyment of navigation and the rights incident thereto. *Ibid.*

3. The right of the public to hunt on the navigable streams of this state is, like the right to fish in such streams, an incident of the right of navigation. *Ibid.*

4. Hunting on navigable waters is lawful when it is confined strictly to such waters while they are in a navigable stage, and between the boundaries of ordinary high-water marks; and when so confined it is immaterial what the character of the stream or water is, whether deep or shallow, clear or covered with aquatic vegetation. *Ibid.*

5. By ordinary high-water mark is meant the point on the bank or shore up to which the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristic. *Ibid.*

6. Where the bank or shore at any particular place is of such a character that it is impossible or difficult to ascertain where the point of ordinary high-water mark is, recourse may be had to other places on the bank or shore of the same stream or lake to determine whether a given stage of water is above or below ordinary high-water mark. *Ibid.*

[7. Whether the public has a right to hunt between ordinary high-water marks on a navigable stream which, owing to a low stage of water, is unnavigable, or on land between such marks which has become dry or exposed, not decided.] *Ibid.*

Federal control: River harbors: Improvement: Ownership of river bed, etc.: Condemnation. See MUNICIPAL CORPORATIONS, 14–25.

8. Under the commerce clause of the federal constitution the United States has a certain control over navigation and its incidents, including improvements of navigable rivers and bridges spanning the same. This is paramount to but not exclusive of state control of the subject, which is much broader and extends to many regulations with which the federal government does not concern itself. *State ex rel. Thomas F. Co. v. Milwaukee,* 549

9. Where money is appropriated by Congress for the improvement of a harbor, subject to the condition that the plans therefor shall be approved by the federal government, the form and manner of approval are matters for the administrative department of that government. *Ibid.*

10. The mere fact that land sought to be condemned by a city for the improvement of its river harbor was to be conveyed to the United States as a condition of receiving a federal appropriation, did not affect the right of the city to take the property. The city would acquire only an easement, and a conveyance by it, even though expressly authorized by the state legislature, would not confer proprietory rights upon the United States nor in any way impair the authority of the city or the state over the new river bed. *Ibid.*

11. In the original river bed there were three interests: (1) that of the riparian proprietor, who held a qualified title; (2) paramount to this the public interest represented by the state, for the purposes of navigation or improvement; and (3) paramount to these two the governmental or sovereign interest of the United States which it might exert in aid of navigation or other incident of interstate commerce; and the enlarged bed created by condemnation proceedings has the same legal status as the former river bottom. *Ibid.*

NEGLIGENCE.

See HIGHWAYS. INSTRUCTIONS TO JURY, 3. LANDLORD AND TENANT, 12, 13. MASTER AND SERVANT, 2–29. PLEADING, 1. RAILROADS, 12–39. STREET RAILWAYS, 11, 12.

Objects attractive to children: Dangerous acts: Custom.

1. It was not an obviously dangerous act to leave uncovered and unfenced a mortar box filled with lime and water over which

was spread a thin layer of sand, where such box was upon private property near a building which was being erected and so far from the sidewalk as not to affect travel thereon or be a source of danger to those who remained on the sidewalk or street, even though the box and a neighboring sandpile were attractive to children, who were in the habit of playing about the place. *Zartner v. George*, 131

2. It appearing that it was customary and even necessary at that season of the year to leave mortar boxes in which lime was slacking in the condition in which the box in question was left, a verdict for defendants was properly directed in an action for injury to a boy about seven years old who went upon the premises to play, jumped into the box, and sustained serious burns on his feet from the hot lime. *Ibid.*

3. Liability for injury to trespassers on private property should be limited to cases where the act complained of partakes of the nature of gross negligence, obviously endangering the safety of others, or to active negligence committed at the time of injury. *Ibid.*

4. The owner of private premises may safely, so far as trespassers are concerned, engage in any lawful ordinary work thereon and conduct it in a customary manner without incurring liability, even though some danger to them may reasonably be anticipated from the condition of the premises created by so conducting his work. *Ibid.*

Operations dangerous to children.

5. If a person lawfully conducts operations in a place and manner liable to imperil the safety of children of tender years rightfully in the vicinity, and such children are or may be reasonably expected to be lawfully there, he owes to them the duty of exercising ordinary care to protect them from such peril. *Webster v. Corcoran Bros. Co.* 576

6. Defendant's servants, by means of a rope and tackle operated by horses, were raising sacks of oats from a wagon standing in an alleyway to the third story of a barn. Plaintiff, about eight years old, and other boys had been playing with the rope and had been ordered away, but remained near by. A kink having formed in the rope, plaintiff was told by the driver of the horses to straighten it out. As he took hold of the rope near a pulley, the driver negligently started the horses and plaintiff's hand was drawn into the pulley and injured. The jury found that defendant's servants did not exercise ordinary care to prevent plaintiff from incurring danger from handling the rope. *Held*, that the defendant was liable for the injury. *Ibid.*

Riding bicycle in school grounds: Injury to child. See NEGLIGENCE, 12.

Dangerous temporary sidewalk.

7. No permit from municipal authorities for the temporary use of a street for building purposes can justify the construction or maintenance of a temporary sidewalk in a manner dangerous to pedestrians. *Fuhrmann v. Coddington E. Co.* 650

8. Upon evidence tending to show that a temporary walk built in the street by a building contractor was only twenty-five inches wide at the place of accident, that a considerable part of this

would be covered by the overhang of a passing street car, and that crushed stone piled on the other side between the walk and curb overflowed upon the walk and at time shoved it over nearer the street-car track, the jury were warranted in finding negligent construction or maintenance of such walk. *Ibid.*

9. Whether such negligence was the proximate cause of an injury to the plaintiff who, while using such walk, was struck by a street car coming from behind him, and whether in using the walk he was guilty of contributory negligence, were in this case questions for the jury. *Ibid.*

Dangerous obstruction over switch track.

10. The questions whether a manufacturing company was negligent in leaving a movable bridge or runway of planks across a switch track in its yard, and whether the foreman of a switching crew who was injured by coming in contact therewith while he was riding at night upon the footboard of a switch engine was guilty of contributory negligence, are *held*, upon the evidence, to have been for the jury. *Landry v. Webster Mfg. Co.* 248

Pleading: Sufficiency of complaint.

11. A complaint need not negative contributory negligence on the part of the plaintiff, that being defensive matter. *Paradies v. Woodard,* 243

12. A complaint alleging in substance that defendant, a boy between thirteen and fourteen years old, drove and rode a bicycle upon which another boy was riding with him, thus making it more difficult to manage and more dangerous, in the playgrounds of a public school where such riding was expressly forbidden, at such a speed, without warning, and with such want of ordinary care that he knocked down, ran over, and injured the plaintiff, is *held*, on demurrer, to state a cause of action. *Ibid.*

Evidence of custom.

13. Where an act which was not obviously dangerous but which resulted in injury is alleged to have been negligent, evidence of custom is admissible for the purpose of showing whether or not the act was done as it is usually done under the same or similar circumstances, and thus to aid in determining its character. *Zartner v. George,* 131

14. In such case it is not necessary that either party should have known what the custom was at the time the alleged negligent act was done. *Ibid.*

Contributory negligence. See HIGHWAYS, 3. INSTRUCTIONS TO JURY, 3. MASTER AND SERVANT, 3, 5, 7, 11, 13, 14, 21–23, 28, 29. NEGLIGENCE, 9–11. RAILROADS, 14, 26–32, 38. STREET RAILWAYS, 12.

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Of election. See ELECTIONS. PUBLIC UTILITIES, 2.

Of defects. See HIGHWAYS, 2.
Of entry of judgment. See JUDGMENT, 3.
To terminate tenancy from year to year. See LANDLORD AND TENANT, 9–11.
Of dangerous defect in hallway. See LANDLORD AND TENANT, 13.
Of pendency of action. See LIENS, 2. LIS PENDENS.
Of receiver's sale. See RECEIVERS, 1.
Of nonwarranty of seeds. See SALES, 2–4.
Of intent to hinder and delay. See TAX TITLES, 5.
Of application for tax deed. See TAX TITLES, 5.

NUISANCES: Abatement: Parties. See HUSBAND AND WIFE.

OBLIGATION OF CONTRACT: Impairment. See CONSTITUTIONAL LAW, 9. COUNTIES, 4.

OFFER of settlement. See EVIDENCE, 3.

OFFICERS.
Commissioner of banking. See BANKS AND BANKING. CORPORATIONS, 3.
Sheriffs and constables. See FALSE IMPRISONMENT, 2, 3.
Mayor of city. See MUNICIPAL CORPORATIONS, 31, 32.
City treasurer. See MUNICIPAL CORPORATIONS, 26–28.
Town officers. See COSTS, 7.
Guardians *ad litem*. See GUARDIANS AD LITEM.
Of corporation: Liability for torts. See CORPORATIONS, 2. MASTER AND SERVANT, 2.

OFFSET. See EXECUTORS, 3. JUDGMENT, 5–7.

OPINION EVIDENCE. See EVIDENCE, 7–10. RAILROADS, 15, 16. WILLS, 7.

OPINIONS of courts. See COURTS, 1.

OPTION.
To remit part of excessive damages. See APPEAL, 15, 18.
For extension of time for cutting. See LOGS AND TIMBER.

ORAL AGREEMENTS. See EVIDENCE, 5, 6. FRAUDS, STATUTE OF, 7. PRINCIPAL AND AGENT, 3.

ORDINANCES. See MUNICIPAL CORPORATIONS, 1, 2, 29–33.

PAROL EVIDENCE to vary writing. See EVIDENCE, 5, 6. PRINCIPAL AND AGENT, 3. SALES, 7, 9.

PARTIES.

See ACCOUNTING. APPEAL, 3. HUSBAND AND WIFE. JUDGMENT, 2–4. LANDLORD AND TENANT, 3, 5, 6. RECEIVERS, 3. WORKMEN'S COMPENSATION ACT, 3.

In an action for malicious assault upon a passenger by a street-car conductor in defendant's employ, it would have been a proper exercise of the trial court's discretion, upon defendant's motion, to require that the conductor be made a party defendant and to permit a cross-complaint to be served upon him as provided in sec. 2656*a*, Stats. *Schmuhl v. Milwaukee E. R. & L. Co.* 585

PARTNERSHIP.

1. Where a creditor accepts an evidence of indebtedness from one of two persons jointly liable and informs the debtor who gives such evidence that he accepts him for the debt, a jury may reasonably draw the inference that the creditor intends to release the other debtor. *Grubbe v. Pierce.* 29

2. Where a due-bill or note of one partner for the amount of a firm debt is accepted by the creditor, and the latter at the same time expressly agrees to accept such partner alone for the debt, such acceptance and agreement make a valid contract which operates to discharge the other partner or partners. *Ibid.*

3. Even if it should be conceded that such an agreement is not supported by any valid consideration, yet if it was made by the creditor with full knowledge of the facts it may be found that he thereby waived his claim against the other partners, especially where there are equitable considerations which might well have induced him to do so. *Ibid.*

PAYMENT.
Of money into court. See APPEAL, 7.
Of income tax: Where to be made. See TAXATION, 8.

PERSONAL INJURIES. See ANIMALS, 3, 4. APPEAL, 19, 20. DAMAGES, 5–8. ELECTION OF REMEDIES, 1. EVIDENCE, 4. HIGHWAYS, 3. JURY. LANDLORD AND TENANT, 12, 13. MASTER AND SERVANT. NEGLIGENCE. PLEADING, 1. RAILROADS, 12–31, 34–39. STREET RAILWAYS, 11. WORKMEN'S COMPENSATION ACT.

PHYSICIANS AND SURGEONS. See EVIDENCE, 8, 9.

PLACE.
Of residence of taxpayer. See TAXATION, 5, 6.
Where income of corporation is taxable. See TAXATION, 7, 8.

PLATS. See DEDICATION.

PLEADING.

Complaint: Sufficiency: Defects, how reached. See ANIMALS, 3, 4. EQUITY. LIBEL AND SLANDER, 2, 3. MASTER AND SERVANT, 2. NEGLIGENCE, 11, 12.

1. Where, in an action for personal injuries, defendant assumes that the complaint charges it with actionable negligence, accepts an issue on that basis, and tries it out, it is too late on appeal to challenge the sufficiency of the complaint. *Fuhrmann v. Coddington E. Co.* 650

2. Defects in a complaint can only be reached by demurrer, by motion, or by objection made before entering upon the trial to the reception of any evidence under it. *Ibid.*

3. A general demurrer to a complaint should be sustained only when the complaint, giving to its language the most liberal construction it will reasonably bear in favor of the pleader, does not show plaintiff to be entitled to any measure of judicial redress of any character. *Sullivan v. Ashland L., P. & S. R. Co.* 445

4. Where equitable relief is asked, the fact that there is an adequate remedy at law is not legitimate ground for a general demurrer. *Ibid.*

Same: Joinder of causes of action. See ACCOUNTING. ELECTION OF REMEDIES.

5. Upon a demurrer for misjoinder of causes of action, if the complaint will fairly admit of a construction to the effect that only one cause of action is stated, that construction should be adopted. *Sullivan v. Ashland L., P. & S. R. Co.* 445

Same: Indefiniteness.

6. Vagueness and indefiniteness in a pleading must be challenged, not by demurrer, but by motion to make more definite and certain. *Murphy v. Interlake P. & P. Co.* 9

Cross-complaint. See PARTIES.

Answer. See APPEAL, 1, 2. EQUITY.

Counterclaim. See EJECTMENT, 1, 2. ELECTION OF REMEDIES, 2. JUDGMENT, 5–7.

7. In an action of trespass to determine the title to a strip of land and for damages, a counterclaim for trespass by plaintiff on the same land is connected with the subject of the action and hence properly pleadable. *Wille v. Maas,* 274

Demurrer. See COSTS, 8. EQUITY. LIBEL AND SLANDER, 2–4. PLEADING, 2–6.

Amendment. See APPEAL, 1, 2.

Pleading over. See COSTS, 8.

PLEDGES. See CORPORATIONS, 3. PRINCIPAL AND AGENT, 6.

POLICE POWER. See CONSTITUTIONAL LAW, 1–8. MUNICIPAL CORPORATIONS, 29–33.

POSITIVE AND NEGATIVE TESTIMONY. See INSTRUCTIONS TO JURY, 5. RAILROADS, 13, 21.

POSSESSION.

Of personal property. See ANIMALS, 1, 2. EXECUTORS, 3. PRINCIPAL AND AGENT, 4, 5.

Of land. See ADVERSE POSSESSION. EJECTMENT. TAX TITLES, 2. TRESPASS.

PRINCIPAL AND AGENT.

Sales by agents: Warranties. See SALES, 3, 4.

1. The fact that a wholesale seed house advertised its seeds in various papers and invited intending purchasers to write for its catalogue and send name of their local dealer, stating that it sold its seeds to retail dealers from whom they might be purchased, is not sufficient to show that a retail dealer who ordered tobacco seed from it at the request of a customer was its agent. *Ross v. Northrup, King & Co.* 327

2. Assuming that in ordering seed for a customer a retail merchant acted as the agent of the customer, the undisclosed principal would have no greater rights against the seedsman than such agent would have had if he had purchased for himself. *Ibid.*

Same: Independent oral agreement by agent.

3. Agents through whom an article (in this case an automobile) is sold, even though the sale is evidenced by a written agreement between their principal and the buyer, may for the purpose of promoting their business as agents make an independent oral contract with the buyer on their own behalf and outside the scope of their agency, by way of warranty of the article sold. *Cooper v. Huerth,* 346

Fraud of agent: Juggling with securities.

4. One S., who was plaintiff's agent, was also the treasurer of the defendant corporation and as such had the keeping of its funds and securities. He was a defaulter to both parties.

Having in his possession a note and mortgage belonging and payable to the plaintiff, he pretended to sell them to defendant and converted to his own use the moneys paid therefor by defendant. No assignment or indorsement of the note or mortgage was ever made, and they remained in the possession of S. until his death, being kept a part of the time with defendant's securities and a part of the time with plaintiff's. The executor of S. turned them over to defendant. *Held* that, the equities of the parties being equal, plaintiff's legal title to the securities must prevail. *Whinfield v. Trustees*, 472

5. The possession of the securities by S. was as much plaintiff's possession as it was defendant's, and the mere exhibition of them to auditing committees of the defendant was not a change of possession or delivery thereof to defendant. *Ibid.*

Same: Sale of pledged stock: Ratification.

6. Defendant, the holder of a note given by a corporation, held stock of the corporation as collateral security. An agent of the corporation, who did not act or assume to act as agent of defendant, sold a part of said stock to the plaintiff by means of fraudulent representations as to its value. Defendant took no part in the sale and had no knowledge of the fraud; but on receiving from the corporation the proceeds of the sale he assigned and surrendered the shares so sold. *Held*, that he did not thereby ratify the acts of the agent of the corporation so as to become liable either to return the consideration paid by the purchaser or to answer in damages for the fraud. *Tripp v. Foster*, 534

Competency of agent as witness: Conversation with person since deceased. See WITNESSES, 2.

PRINCIPAL AND SURETY. See EJECTMENT, 8.

PRIVILEGE. See LIBEL AND SLANDER, 4–10.

PROMISSORY NOTES. See CANCELLATION OF INSTRUMENTS. FRAUDS, STATUTE OF, 1–6. INSANE PERSONS, 2. PRINCIPAL AND AGENT, 4, 5.

PROXIMATE CAUSE. See INSTRUCTIONS TO JURY, 3. NEGLIGENCE, 9. RAILROADS, 26.

PUBLIC DANCES AND DANCE HALLS. See CONSTITUTIONAL LAW, 4, 5, 8. MUNICIPAL CORPORATIONS, 29–33.

PUBLIC IMPROVEMENTS. See MUNICIPAL CORPORATIONS, 5–25. NAVIGABLE WATERS, 8–11.

PUBLIC UTILITIES.

Acquirement by city: Election: Form of question: Notice.

1. At an election to determine whether a city should purchase an existing waterworks plant, the fact that the question in form submitted was "Shall the city of Janesville purchase the Janesville Water Company?" did not mislead the voters or invalidate the election. *Janesville W. Co. v. Janesville*, 655

2. Where, under sec. 926—31, Stats. 1911, and the city charter, ten days' notice must be given of an election upon the question of the acquisition of a public utility by the city, but the first publication was on Sunday, nine days before the election, the notice was insufficient, even assuming that a publication on Sunday was valid; and such insufficiency in this case invalidated

the election, there having been but a small majority in favor of acquiring the utility and it not satisfactorily appearing that the voters had adequate time to investigate, consider, and discuss the subject voted upon. *Ibid.*

Franchises: Construction. See MUNICIPAL CORPORATIONS, 1, 2.

PUNITORY DAMAGES. See SEARCHES, 3.

QUANTUM MERUIT. See FRAUDS, STATUTE OF, 7.

QUIETING TITLE. See JUDGMENT, 4. TAX TITLES, 5, 6.

QUO WARRANTO. See STREET RAILWAYS, 1.

RAILROAD COMMISSION. See RAILROADS, 1–11.

RAILROADS.

Railroad commission: Fixing rates: Review of order: Bases of computation.

1. Upon complaint that a rate or charge exacted by a railway company for any service is unreasonable and exorbitant, the railroad commission may in one proceeding fix and order substituted, under sec. 1797—12, Stats., a rate or charge which they find to be reasonable, and also, under sec. 1797—37*m*, find what would have been a reasonable rate for the service in question and award a refund of excessive charges paid. *Chicago & N. W. R. Co. v. R. R. Comm.* 47
2. An order of the railroad commission under sec. 1797—37*m*, Stats., finding what would have been a reasonable rate or charge and directing a refund, may be reviewed in an action brought under sec. 1797—16, which authorizes an action to vacate and set aside "any order of the commission fixing any rate or rates, fares, charges," etc. *Ibid.*
3. In a proceeding under sec. 1797—37*m*, Stats., it is not required as a condition of relief that the rate or charge be both erroneous, illegal, unusual, and exorbitant. If it comes within either of those descriptive words, the commission should find what in its judgment would have been a reasonable rate or charge for the service in question. *Ibid.*
4. Every rate or charge which is not reasonable and just under sec. 1797—3, Stats., may be found to be erroneous or illegal under sec. 1797—37*m*. *Ibid.*
5. The railroad commission, in fixing rates under the statute, is not required to proceed with the strict formalities which obtain in courts of law or equity, and although the statute contemplates a hearing and the taking of evidence in such cases, there is a large amount of acquired expert knowledge which the commission may apply to facts in evidence in reaching its determination. *Ibid.*
6. In an action in the circuit court to review an order of the railroad commission fixing rates of transportation, the burden rests upon the plaintiff to show by clear and satisfactory evidence that the order complained of is unlawful or unreasonable. *Ibid.*
7. What are just and reasonable railroad rates is a question akin to questions of the reasonable value of services or the reasonable value of property which has no fixed market value. In the investigation of such questions great latitude of evidence is necessarily permitted, and one of the recognized bases of opin-

ion or judgment in such matters is the price paid or charged for other similar services or property. Although the value of such evidence necessarily varies according to the circumstances, a rate made thereon cannot be set aside as unsupported by evidence. *Ibid.*

8. Another basis for computing a reasonable rate is the cost of the service to the carrier, aided and supplemented by a comparison with what it costs other roads to perform like services; and upon this question the statistical evidence supplied by the annual reports of railroad companies to the state board of assessments and to the railroad commission, and the freight tariffs filed by the railroad companies with the commission, together with the decisions of the commission showing methods of computing cost from the details contained in such reports, constitute a sufficient basis, more accurate and thorough than the ordinary statistical bases, for a computation of the cost to a railroad of any particular service. *Ibid.*

9. All such reports, tariffs, and decisions being public records, they need not be formally offered in evidence before the railroad commission or certified up to the circuit court in every action brought to review an order of the commission, in order that they may be considered, but the commission and the court may take judicial notice of their contents, and both parties are at liberty to present computations therefrom in argument at any stage of the litigation, even in the supreme court. *Ibid.*

[10. Whether or not the railroad commission has the right to use and consider reports made to it by persons employed by the commission under sub. (b) of sec. 1797—18, without offering them in evidence, not decided.] *Ibid.*

11. If consulting such reports would be error on the part of the commission, the statutory presumption in favor of its orders would require the appellant therefrom to prove that reports mentioned in its opinion had reference to reports of this character. *Ibid.*

Unlawful search by employees: Damages. See SEARCHES.

Injuries to passenger: Negligence in stopping train.

12. Evidence tending to show that upon the stopping of a freight train the bump of the cars in taking up the slack was an unusually hard one and sufficient to throw the plaintiff (a passenger) and the conductor from their seats in the caboose and to cause the conductor to utter emphatic censure of the engineer, is *held* to sustain a verdict to the effect that the train was brought to a standstill in a negligent manner. *Kinziger v. C. & N. W. R. Co.* 497

Injuries to persons at crossings: Signals: Contributory negligence.

13. In an action for the killing of a person by a railway train at a highway crossing, the positive testimony of the trainmen, corroborated by that of four disinterested witnesses, that the engine bell was rung continuously as the law requires, is *held* to establish that fact conclusively, as against the negative testimony of witnesses who were not giving their attention to the observation of that fact, but to other matters. *Linden v. M., St. P. & S. S. M. R. Co.* 527

14. The evidence in such case, including proof that the deceased manifested the heedlessness of an intoxicated person, is *held*

to show, as matter of law, that his want of ordinary care proximately contributed to cause his death. *Ibid.*

Same: Speed of train: Evidence.

15. The question being whether the speed of a train exceeded the lawful rate of twelve miles per hour, the testimony of a witness who had but a momentary view of the train at a time when he was excited and otherwise engrossed, fixing the speed at about sixteen or seventeen miles per hour, was opinion evidence. *Riger v. C. & N. W. R. Co.* 86

16. Where such testimony, standing alone, was opposed by the uncontroverted fact that the train stopped within thirty feet after signal, and the positive testimony of five trainmen that the speed was from four to seven miles per hour, one comparing the speed to that of a man walking at a fair gait, the trial court was justified in changing the jury's finding that the speed exceeded twelve miles per hour. *Ibid.*

Same: Collision with traction engine: Speed of limited train: Signals: Lookout.

17. Where, as a result of a collision between a fast train and a traction engine at a highway crossing, a piece of iron was hurled through the window of plaintiff's house 147 feet distant and injured her, such injury, though unusual, was not remote and was within the range of reasonable anticipation. *Shaffer v. M., St. P. & S. S. M. R. Co.* 485

18. In view of the existing demand for fast train service, and the fact that the legislature has restricted the speed of trains only in cities and villages, a finding of actionable negligence cannot be sustained upon mere proof that a limited passenger train was operated through the open country at a speed of fifty-seven miles an hour. *Ibid.*

19. Where a limited passenger train, in a run of 368 miles, encounters 362 grade highway crossings, ordinary care does not require that it should be slowed down at each of such crossings. *Ibid.*

20. The fact that between the whistling post and a point 300 feet distant from an ordinary grade crossing there is a one-degree curve in the track, the track being straight for a long distance beyond those points in both directions, is not alone enough to require greater precautions in approaching such crossing than the statute prescribes, where the view of the track from the intersecting highway is unobstructed; although where there are special circumstances or conditions which should and ordinarily would induce an ordinarily prudent person to exercise greater caution, the rule may be different. *Ibid.*

21. Positive testimony of the trainmen as to the giving of statutory signals as the train approached the crossing in question, considered in connection with the weather conditions, the negative character of opposing testimony, and the opportunities for observation of the witnesses giving it, is *held* to have justified the trial court in setting aside the findings in the special verdict to the effect that the signals were not given. *Ibid.*

22. It appearing that at this stage of his run the duties of the fireman in keeping up steam took all his time, the fact that

he was not at the cab window when the collision occurred did not warrant a finding that he was negligent. *Ibid.*

23. The number of men to be carried on a locomotive engine being regulated by sec. 1809*r*, Stats. 1913, it is not within the province of a jury to say that a railway company is negligent in not having a larger crew. *Ibid.*

24. Where a traction engine is seen approaching a railway crossing under customary easy control, the operators of a train which is also approaching such crossing are not required to slacken its speed, but have the right to presume that there will be no attempt to cross ahead of it. *Ibid.*

25. Where a traction engine was propelled upon a railway track under such circumstances that it was impossible to stop a train in time to avoid a collision after the trainmen, in the exercise of ordinary care, had observed it on the track, the mere fact of the collision does not justify a finding that the trainmen were negligent. *Ibid.*

Failure to fence: Killing of person on track: Absolute liability: Gross negligence: Intoxication.

26. Under sec. 1810, Stats., a railway company being absolutely liable for injury "occasioned in any manner, in whole or in part," by its failure to fence its road as therein required, the ordinary rules relative to proximate cause are not applicable and contributory negligence is not a defense. *Alexander v. M., St. P. & S. S. M. R. Co.* 477

27. Where, at a point where defendant should have fenced its road, the team which plaintiff's intestate was driving went upon the right of way at night without his knowing it, because of his intoxicated condition or his inattention, and within twenty minutes thereafter, having traveled about 450 feet on the right of way, the horses and the deceased were struck and killed by a train, such facts constituted no defense to an action for damages on account of his death, the jury having found that such death was occasioned, in whole or in part, by the want of a fence where the team entered on the right of way. *McDonald v. C., M. & St. P. R. Co.* 75 Wis. 121, distinguished and doubted. *Ibid.*

28. Sec. 1811, Stats., which prohibits traveling lengthwise upon a railroad track, under penalty, does not preclude a recovery in the case above stated, the deceased not having wilfully or intentionally entered upon the right of way and not having purposely or avoidably remained or driven thereon. *Ibid.*

29. Mere inadvertence, even when caused by intoxication, with no element of intentional, wanton, or reckless action, does not amount to gross negligence. *Ibid.*

30. The evidence in this case does not show that there was any highway crossing at the point where plaintiff's intestate got upon the defendant's right of way which would excuse defendant from building and maintaining a fence; and it supports a finding by the jury that the place was not depot grounds. *Ibid.*

31. Sec. 1810, Stats., is valid and does not conflict with federal legislation. *Ibid.*

Injury to person on track. See MASTER AND SERVANT, 10.

Killing of horses on track.

32. In an action to recover for two stallions which had escaped to the highway and thence to defendant's right of way, where they were struck by a train, the evidence of contributory negligence is *held* sufficient to take that question to the jury, in view of the fact that the safe keeping of stallions requires the use of more than ordinary care. *Evans v. C. & N. W. R. Co.* 36

33. In such action, the plaintiff having testified that he did not allow his horses to run at large on the highway, it was competent to show that they had been frequently seen on the highway before the accident, to prove a breachy habit. *Ibid.*

Injuries to employees: Dangerous location of switch stand.

34. In an action by a switchman for injuries sustained by collision with a switch stand while he was climbing the ladder of a box car, the jury answered affirmatively a question as to whether it was customary for railroad companies having switch yards in that vicinity to locate switch stands for uses similar to those of the stand in question as close to the tracks as that stand was located. An instruction as to such question is *held* to have been erroneous and prejudicial because it permitted or required the jury to answer in the affirmative if some railroad companies, in the ordinary course of their business, located some such switch stands—no matter how few so there were more than one—at that distance from the rail. *Emberg v. G. N. R. Co.* 396

Same: Federal statute: Track repairing: Unlawful employment of boy.

35. In an action by a railway employee for personal injuries, the objection that the plaintiff was employed in interstate commerce and hence that the case is governed by the federal statute, if not raised before or during the trial, is waived and cannot be raised for the first time on appeal. *Leora v. M., St. P. & S. S. M. R. Co.* 386

36. Where a boy under the age of eighteen, employed as member of a section crew, was injured while riding on a handcar to a point where he and the other members of the crew were to move a switch track so as to facilitate the loading of cars from an ore pile, he was in every substantial sense employed in "track repairing" within the meaning of secs. 1728*f*, 1728*h*, Stats. 1911, which make a misdemeanor the employment of a child under eighteen years of age in such work. *Ibid.*

37. The purpose of the statute being beneficent, it should be liberally construed to accomplish the end designed. *Ibid.*

38. The violation of the statute, being made a misdemeanor, results in liability for consequent injuries to the infant employee, regardless of the question of contributory negligence. *Ibid.*

39. The expert testimony being conflicting, and nearly evenly divided as to number of witnesses, upon the question whether plaintiff was rendered imbecile as the result of his injury, or was merely suffering from hysteria, the verdict of the jury in that regard will not be disturbed on appeal. *Ibid.*

Same: Negligence of third person: Obstruction on switch track. See NEGLIGENCE, 10.

Street railways. See STREET RAILWAYS.

RATES: Fixing. See RAILROADS, 1-11.

RATIFICATION. See PRINCIPAL AND AGENT, 6.

REAL-ESTATE AGENTS. See FRAUDS, STATUTE OF, 7.

REAL PARTY IN INTEREST. See JUDGMENT, 2-4. RECEIVERS, 3. WORKMEN'S COMPENSATION ACT, 3.

REAL PROPERTY. See ADVERSE POSSESSION. CANCELLATION OF INSTRUMENTS. CONTRACTS, 4. COSTS, 3. DAMAGES, 2. DEDICATION. DEEDS. EJECTMENT. EVIDENCE, 6. FIXTURES, 2. HUSBAND AND WIFE. JUDGMENT, 4. LANDLORD AND TENANT. LIENS. LIS PENDENS. LOGS AND TIMBER. MUNICIPAL CORPORATIONS, 5-25. NAVIGABLE WATERS. PLEADING, 7. TAX TITLES. TRESPASS. VENDOR AND PURCHASER.

REASONABLE TIME. See LOGS AND TIMBER.

REASSESSMENT. See MUNICIPAL CORPORATIONS, 13.

REBUTTAL. See TRIAL, 1, 2.

RECEIVERS.

Sale of leasehold: Terms: Agreement by purchaser.

1. An order for the sale by a receiver of the interest of an insolvent corporation in a lease of an amusement park provided that upon the sale being made and confirmed the purchaser should execute a contract assuming the obligations of the lease and agreeing to pay the rent reserved therein; the notice of sale stated that the "interest and liability as lessee" of such corporation would be sold; and the receiver's report of sale and the order of confirmation recited that the sale had been made in conformity to the order of sale. *Held*, that the purchaser at the sale, being chargeable through his attorneys, if not personally, with knowledge of the contents of such order and notice of sale, was liable for the rent thereafter accruing on the lease, he having taken possession of the premises and assigned the lease to a corporation, although he did not execute any contract assuming the obligation of the lease and neither the report of sale nor the order of confirmation made any specific reference to such condition or requirement. *Zwietusch v. Luehring*, 96
2. The fact that the receiver's report of sale stated that he had executed a deed to the purchaser before confirmation, which was contrary to the order of sale, and that such report was confirmed, would not relieve such purchaser from the liability assumed when he made the purchase; nor could the purchaser escape the burdens then assumed by obtaining possession of the deed and then refusing to enter into a contract as directed by the order of sale. The statute of frauds has no application to such a situation. *Ibid.*
3. Where by the terms of a receiver's sale of corporate property, including a leasehold interest in land, the purchaser was required to assume the obligations of the lease, and one stockholder, pursuant to a reorganization agreement, purchased the property for the benefit of himself and other stockholders, all of such associates became bound by the obligation assumed. *Ibid.*

REDEMPTION from tax sale. See TAX TITLES.

RE-ENTRY. See LANDLORD AND TENANT, 7, 8.

REFERENCE. See JUDGMENT, 7.

REFORMATION OF INSTRUMENTS.

See COURTS, 2.

1. Reformation of a written contract on the ground of mutual mistake can be had only upon clear and convincing evidence thereof. *Garage E. M. Co. v. Danielson*, 90
2. Where reformation was granted upon what the trial judge in an opinion styled "a slight preponderance of the evidence," but this court is satisfied that the evidence was in fact clear and convincing, the judgment below, being right, is affirmed, although arrived at by the adoption of an incorrect rule of law. *Ibid.*
3. Under the circumstances of this case (stated in the opinion), plaintiff was not guilty of laches in failing to detect the mistake in the contract, nor was there unreasonable delay in seeking reformation. *Ibid.*

REFRESHING MEMORY. See WITNESSES, 4.

REFUND of excessive charges. See RAILROADS, 1, 2.

RELEASE of one partner. See PARTNERSHIP.

REMEDIES. See ELECTION OF REMEDIES. LANDLORD AND TENANT, 4. SALES, 11, 12. TAXATION, 9. WORKMEN'S COMPENSATION ACT, 2, 3.

RENT. See LANDLORD AND TENANT. RECEIVERS.

REPLEVIN. See EXECUTORS, 3.

REPORT of judicial sale. See RECEIVERS, 1, 2.

REPORTS to railroad commission, etc.: Evidence. See RAILROADS, 8–11.

REQUESTS for instructions. See INSTRUCTIONS TO JURY, 1, 2.

RESCISSION. See CANCELLATION OF INSTRUMENTS. CONTRACTS, 2–4.

RES GESTÆ. See EVIDENCE, 4. INSTRUCTIONS TO JURY, 4.

RESIDENCE of taxpayer. See TAXATION, 5, 6.

RESULTING TRUSTS. See HUSBAND AND WIFE, 2.

REVOCATION of license of dance hall. See MUNICIPAL CORPORATIONS, 32.

RIPARIAN RIGHTS. See NAVIGABLE WATERS, 1–7, 11.

RIVERS. See MUNICIPAL CORPORATIONS, 14–25. NAVIGABLE WATERS.

ROADS AND STREETS. See HIGHWAYS. MUNICIPAL CORPORATIONS, 5–13. STREET RAILWAYS, 4–10.

RULES OF COURT.

Circuit Court Rule XXXII (Taxation of costs: Review), 215, 218.

SALES.

Construction of contract. See MUNICIPAL CORPORATIONS, 3.

Warranties. See PRINCIPAL AND AGENT, 1–3.

1. Leaving custom out of consideration, where a certain variety of seed is called for and seed is furnished in response to such call, there is a warranty that it is true to description unless

the seller advises the purchaser that the sale is made without warranty. *Ross v. Northrup, King & Co.* 327

2. Where to the knowledge of the seedsman seed was ordered from his printed catalogue, and upon the first page of such catalogue, also at the top of the blank order sheet therein and upon one side of the shipping tag attached to the package of seeds, was conspicuously printed a positive refusal to warrant any seeds as to description, quality, productiveness, or any other matter, or to be in any way responsible for the crop, there was no warranty of the genuineness or productiveness of the seed. *Ibid.*

3. In such case, where the seed was ordered by a retail merchant as agent for another, notice to such merchant that the seed was not warranted was notice to his principal; and such would be the effect of notice printed on the invoice, though received after the seed had been delivered to the principal, if the agent might reasonably have notified him before the seed was used. *Ibid.*

4. The principal could not escape the effect of such notice by showing that the agent paid no attention to and failed to observe what was so plainly called to his attention. *Ibid.*

5. A general trade custom among wholesale seedsmen not to warrant seeds is binding upon a retail dealer purchasing from one of them, although such purchaser may be ignorant of it. *Ibid.*

6. In an action to recover for breach of an implied warranty of farm seeds, a general trade custom not to warrant being shown, it was immaterial that defendant had previously sent to plaintiff's agent a cabinet containing packages of garden seeds with no disclaimer printed on such packages, at least unless defendant knew that the latter was ignorant of such custom. *Ibid.*

Same: Implied warranty that goods are merchantable.

7. Where a written contract of sale does not show that the sale was made by sample, evidence that such was the fact is not admissible to affect the contract in any way. *Berry v. Wadhams O. Co.* 588

8. Although an executory contract of sale of goods at a distance, not open to the inspection of the vendee, contains no express warranty of quality, there is an implied warranty that the goods are merchantable in quality; hence evidence that gasoline tendered by the vendor under such a contract was unmerchantable because of its obnoxious odor was admissible. *Ibid.*

9. Evidence that the term "74-degree gasoline" in a written contract of sale meant, as used in the trade, a product with certain qualities as to color and smell, did not tend to vary the contract and was competent. *Ibid.*

Breach of contract: Remedies of vendor: Damages.

10. If the vendee in an executory contract of sale repudiates it without just cause, the vendor may properly treat the contract as terminated and sell the property for cash for the purpose of liquidating the damages. *Berry v. Wadhams O. Co.* 588

11. Under an executory contract for the sale, at a stipulated price, of a specific article of personal property to be delivered at a particular place and at a time determinable by the vendor, if

the vendee, upon being notified of the time for delivery, either refuses to accept the property unless upon a material condition not named in the contract, or by neglecting to make any provision for accepting manifests an intention not to accept, the vendor may choose between three courses of action stated in the opinion. *Haueter v. Marty*, 208

12. Having once chosen one of such courses of action, either actually or constructively, the vendor's rights must be vindicated by that method. *Ibid.*

13. But where the contract does not relate to specific articles which can be treated as the property of the executory vendee before or at the time of the breach, the vendor's only remedy is to recover the excess, if any, of the contract price over the fair market value at the agreed time and place of delivery. *Ibid.*

14. Where plaintiff sold cheese to be delivered at a certain railway station when marketably matured, and thereafter notified the vendees that delivery would be made on a certain date but the vendees before that date gave notice that they would not accept the cheese until they had first inspected it at the place to which it was to be shipped from said station, and on the date named failed to attend at said station or receive the cheese, there was a breach of the contract on or before said date. *Ibid.*

15. If in such case there was no market value for the cheese at the time and place for delivery, the market value at advantageous points for dealing in such property, in connection with necessary expenses in reaching such markets, would be proper evidence of fair value. *Ibid.*

16. A sale of the cheese by plaintiff five months after the breach, to which the vendees were not made parties by notice and which was not characterized by any of the essentials to give it evidentiary value, was in this case without probative force upon the question of damages. *Ibid.*

Fraud in sale: Ratification. See PRINCIPAL AND AGENT, 6.

Conditional sales. See FRAUDULENT CONVEYANCES.

SALES FOR TAXES. See MUNICIPAL CORPORATIONS, 26–28. TAX TITLES.

SALES OF LAND. See CANCELLATION OF INSTRUMENTS. CONTRACTS, 4. DEDICATION. DEEDS. EVIDENCE, 6. FIXTURES, 2. LIENS. LOGS AND TIMBER. RECEIVERS. VENDOR AND PURCHASER.

SCIENTER. See ANIMALS, 3.

SEARCHES.

Damages: Evidence.

1. Where employees of the defendant railway company, without warrant or authority of law, at midnight, when plaintiff, a widow, was alone in her dwelling house, without her consent entered and searched the house for the avowed purpose of obtaining information or evidence to be used in an effort to convict her son of burglary, there was a wilful wrong affecting her personal security and she is entitled to damages for her mental suffering caused thereby. It was error, therefore, to exclude evidence showing how the entry and search affected her feelings and health, her nervous system, sleep, and appetite. *Shall v. M., St. P. & S. S. M. R. Co.* 195

2. Evidence in such case that plaintiff walked around with a lamp after defendant's employees while they were making the search, and said they were welcome to any information they might find in her house, did not establish that she consented to the search, in face of direct testimony that she objected thereto and where the trial court excluded evidence offered to show that after one of said employees showed his star she was afraid to make further resistance. *Ibid.*

3. Punitory damages were not recoverable under the evidence in this case. *Ibid.*

SEEDS: Warranty. See SALES, 1–6.

SETOFF AND COUNTERCLAIM. See EJECTMENT, 1. ELECTION OF REMEDIES, 2. EXECUTORS, 3. JUDGMENT, 5, 6.

SETTLEMENT. See EVIDENCE, 3. JUDGMENT, 7. MASTER AND SERVANT, 30.

SHERIFFS AND CONSTABLES. See FALSE IMPRISONMENT, 2, 3.

SIDEWALKS. See NEGLIGENCE, 7. WORKMEN'S COMPENSATION ACT, 2.

SINKING FUNDS. See WILLS, 8, 9.

SLANDER. See LIBEL AND SLANDER, 1–3.

SPECIAL VERDICT. See APPEAL, 20. TRIAL, 3–6. VENDOR AND PURCHASER, 3, 4.

SPECIFIC PERFORMANCE.

Equity will not enforce the specific performance of a building contract against private persons, and much less against the public. *McDougall v. Racine Co.* 663

SPEED.
Estimates. See EVIDENCE, 7. RAILROADS, 15, 16.
Of train, when not negligent. See RAILROADS, 18, 19.

STATE AND FEDERAL GOVERNMENTS. See NAVIGABLE WATERS, 8–11.

STATUTE OF FRAUDS. See FRAUDS, STATUTE OF.

STATUTE OF LIMITATIONS. See APPEAL, 1, 2.

STATUTES.

Constitutionality. See CONSTITUTIONAL LAW. COUNTIES, 3, 4. NAVIGABLE WATERS, 8. RAILROADS, 31.

Construction. See ANIMALS, 3. APPEAL, 4, 6, 7, 9, 13–15. BANKS AND BANKING, 2. BURGLARY. COSTS, 2, 3. COUNTIES, 4. DIVORCE. DRAINS. EJECTMENT, 5–8. EVIDENCE, 4. EXECUTORS, 3. FRAUDS, STATUTE OF. GARNISHMENT. GUARDIANS AD LITEM, 1. INTOXICATING LIQUORS, 1. JUDGMENT, 2. LANDLORD AND TENANT, 9. LIENS, 3. MASTER AND SERVANT, 3, 4, 18. MUNICIPAL CORPORATIONS, 1, 2, 4, 5–7, 13–29, 34. NAVIGABLE WATERS, 1. PARTIES. PLEADING, 7. PUBLIC UTILITIES, 2. RAILROADS, 1–5, 10, 23, 26, 28, 36–38. STATUTES, 12. TAXATION, 1–4, 10. TAX TITLES, 6. TRESPASS, 2. TRIAL, 3. WITNESSES, 2. WORKMEN'S COMPENSATION ACT.

1. Like all other rules of construction, the rule that laws of a penal character are to be strictly construed is not to be applied unless obscurity of meaning in a statute calls for construction. *State v. Boliski,* 78

2. The dominating purpose of all construction being to arrive at the legislative intent, words should be read sensibly, and sometimes a liberal construction is required even in respect to a penal statute. *Ibid.*

3. If the legislative purpose in a penal statute is uncertain and the words used may mean one thing or another according to the intent with which they were used, they should be read, ordinarily, so as to minimize rather than extend their penal character. *Ibid.*

4. The legislation of a state is presumed to be regulatory of persons and property in that state unless otherwise expressed. *State ex rel. Wis. Trust Co. v. Leuch*, 121

5. Where the same word or phrase is used in different sections of the same statute for different objects and in different context, it need not be given the same meaning in each section. *State ex rel. City Const. Co. v. Kotecki*, 278

Amendment. See BURGLARY. DRAINS, 3.

Repeal.

6. In general, a statute covering the subject matter of a former enactment repeals it. *Madison v. Southern Wis. R. Co.* 352

7. Whether an entire statute was impliedly repealed by a later one covering, in general, the same subject, is a matter of legislative intention. *Ibid.*

8. Repeals by implication are not favored and, so, an earlier enactment is not deemed repealed by a later one, unless the two cannot reasonably consist with each other. *Ibid.*

9. Where a revision of an earlier law expressly repeals all prior acts and parts of acts inconsistent therewith, a purpose appears to retain such parts of the former as are not clearly repugnant to the latter. *Ibid.*

10. The last rule restricts the first but does not save a substantial characteristic of the earlier enactment, omitted from the later one; the earlier enactment, thus characterized, and the later one, not so featured, are, in general, to be regarded as inconsistent and the former as falling under the fourth rule. *Ibid.*

11. A statute obviously intended to supersede an earlier enactment, so supersedes, without any express repeal, thus annulling any particular provision of the later not incorporated into the former. *Ibid.*

12. The stated rules for statutory construction are general, in respect to the situation to which they respectively apply; but are subservient to the supreme rule that the purpose of the legislature should be vitalized by judicial construction when it can be discovered from the whole enactment, by itself, or in connection with others or any circumstances characterizing it,—the intention being regarded as matter of fact, determinable by evidentiary rules and circumstances. *Ibid.*

13. In case of a superseding street railway ordinance which is complete in itself, but omitting features of the former ordinance which characterized it as a whole or containing new features, giving significant cast thereto, with a repealing clause as in rule 9, the words, "all acts" should, ordinarily, be regarded as not limited by the words "parts of acts."

Mandatory or directory? See MUNICIPAL CORPORATIONS, 19.

STREET RAILWAYS.

Franchises: Validity: Use of streets.

1. In granting a franchise to a street railway company under sec. 1862, Stats., a city acts as the agent of the state; and only the state, by an action of *quo warranto*, can question the validity of such franchise. *Milwaukee v. Milwaukee E. R. & L. Co.* 83

2. *It seems* that a city may grant to a street railway company a franchise to use, "when opened," streets for the opening of which proceedings are then pending. *Ibid.*

Same: Commencement of term: Acceptance.

3. Where the resolution granting a franchise to use certain streets fixed a certain date for the commencement of the term of such franchise, without requiring acceptance thereof, *it seems* that such provision governs, although the resolution also provided that "the rights hereby conferred shall be subject to all the terms and conditions set forth in" a previous franchise ordinance, which provided that the term thereof should commence upon the passage and publication of the ordinance *and acceptance thereof*. *Milwaukee v. Milwaukee E. R. & L. Co.* 83

Same: Construction: Paving of railway zone: "Regulations."

4. In case of a superseding street railway franchise, granted by a common council, containing a condition burdening the grantee to keep the railway zone "in proper repair" and "in proper order and cleanliness" in the words of the original franchise, but omitting a particular condition of the latter, common to such franchises, burdening the grantee with the duty to pave and repave, as needed, the street within the railway zone; but framed so as, in the whole, to clearly evidence a purpose to burden the grantee with responsibility for the proper condition of the railway zone, the words "proper repair" and "proper order" should be given the broad meaning of including paving and repaving, where "proper repair" and "proper order" would reasonably call therefor in the judgment of the governing body of the grantor. *Madison v. Southern Wis. R. Co.* 352

5. A franchise duty imposed on a street railway company to keep its railway zone in "proper order," is a continuing obligation, including duty to conform the character of the railway zone to the physical condition of the street outside thereof, as such condition, in the judgment of the governing body of the grantor, may from time to time be changed to accommodate the needs of the people. *Ibid.*

6. The omission from a street railway franchise of a specific requirement of the old grant requiring the grantee to pave and repave the railway zone, as needed in the judgment of the grantor, but retaining the former requirement to keep the railway zone in "proper repair" and "proper order" and adding a new feature expressly making the grant "subject to such reasonable rules and regulations respecting the streets and highways as such council may from time to time enact," should be regarded as clearly intending to burden the grantee with the duty of keeping the railway zone in such condition as the grantor may reasonably require, changing the physical condition, from time to time, to that end. *Ibid.*

7. A street railway company franchise granted upon the conditions mentioned, emphasizing the duty of the grantee under sec. 1862

of the Statutes, should be construed in the light of *State ex rel. Att'y Gen. v. Madison St. R. Co.* 72 Wis. 612, as reserving to the grantor authority to make regulations, from time to time, as regards paving and repaving the railway zone. *Ibid.*

8. The term "regulation" as used in respect to the police power, is very comprehensive, extending to requirements as to creation of physical conditions and of preserving the same and of creating other conditions from time to time. *Ibid.*

9. The term "reasonable rules and regulations" of "the highway as the council may from time to time enact," when used in a street railway franchise and as used, in effect, in the statute, sec. 1862, should be construed with regard to the broad comprehensive meaning of the term "regulation," the length of such a grant, the probable necessity for changes, from time to time, in the structural character of streets, the importance of absence of divided responsibility for the physical condition of the railway zone, and all other characterizing circumstances. *Ibid.*

10. A municipality, with the broad powers of regulation as regards streets, may make reasonable regulations, burdening a public utility using the street with the duty to make, at its own expense, reasonable changes in the physical condition of the zone so used, irrespective of anything contained in the public utility franchise, and this broad power, it is under disability to contract away. *Ibid.*

Same: New ordinance superseding prior one: Repeal. See STATUTES, 13.

Assault by conductor upon passenger. See PARTIES.

Killing of person on track: Gross negligence.

11. In an action for the death of a pedestrian who, while attempting to cross the street, stepped immediately in front of a street car and was struck thereby, it is *held*, contrary to findings by the jury, that there was no evidence of gross negligence or wilful misconduct on the part of the motorman and that defendant was entitled to a directed verdict. *McCabe v. Milwaukee E. R. & L. Co.* 621

Collision with automobile: Contributory negligence.

12. In an action for injury to an automobile by collision with a street car, the evidence is *held* to show conclusively that the chauffeur, who drove the automobile upon the track from a cross street, was guilty of contributory negligence in failing to avoid the danger after he saw or might have seen the car approaching. *Bertrand v. Milwaukee E. R. & L. Co.* 639

STREETS. See MUNICIPAL CORPORATIONS, 5–13. STREET RAILWAYS, 4–10.

SUPREME COURT. See APPEAL AND ERROR.

SURETYSHIP. See EJECTMENT, 8.

SURPRISE. See TRIAL, 6.

SURRENDER of lease. See LANDLORD AND TENANT, 7.

TAXATION.

Exemptions: Stock of corporations "in the state:" Foreign corporations.

1. While it is a general rule that statutes exempting property from taxation are to be strictly construed, that rule comes into play

only when ambiguity appears. *State ex rel. Wis. Trust Co. v. Leuch*, 121

2. A foreign corporation having property and agents and carrying on business in this state is "in the state," within the meaning of the statute (sec. 1038, Stats.) classifying corporations for the purpose of exempting from taxation their shares of stock. *Ibid.*

3. The words "any corporation," in sub. 9 of said sec. 1038, mean every corporation, foreign or domestic, limited only by the requirements that it be in the state and that its property be taxed in the same manner as that of individuals. *Ibid.*

4. The provision of said sec. 1038, exempting "stock in any corporation in this state which is required to pay taxes upon its property in the same manner as individuals" (sub. 9), refers to its property in this state, and under it the shares of a foreign corporation which carries on a large department store in the state, has a large amount of property here, and is licensed to do business in the state, are not subject to assessment. *Ibid.*

Place of taxation: Residence of taxpayer: Board of review.

5. A finding by the board of review, in making assessments (under sec. 1059, Stats.) of property omitted in previous years, that the owner was a resident of the taxing district, being a finding going to the jurisdiction of the board, is not conclusive on review and cannot be sustained unless it has substantial basis in the evidence. *State ex rel. Ilsley v. Leuch*, 631

6. Upon the undisputed facts in this case it is *held* that personal property claimed to have been omitted from assessment in the city of Milwaukee was not taxable there, the owner having theretofore changed his domicile from the city to the town of Milwaukee. The mere facts that he continued to have a business office in the city and that he moved into the city temporarily in the winter, he being about seventy years old, were not inconsistent with an unmistakable effectuated intent to establish his residence in the town. *Ibid.*

Same: Income taxes: Corporations.

7. For the purpose of taxation under the state Income Tax Law, the *situs* of the income of a corporation is not at the state capital, but in the town, city, or village in which the corporation is located. *Superior v. Allouez Bay D. Co.* 177

8. The tax is to be paid to such town, city, or village, and if not paid is to be collected by the local authorities, not by the state. *Ibid.*

Collection of income taxes: Actions.

9. All remedies and actions given for collection of taxes on personal property are available for the collection of the income tax, including taxes of corporations. *Ibid.*

10. Under sec. 1107*a*, Stats., an action for the collection of an income tax may be brought in the circuit court. *Ibid.*

Levy: Budget in cities. See MUNICIPAL CORPORATIONS, 34.

Special assessments: Enforcement. See MUNICIPAL CORPORATIONS, 5–13, 26–28.

Reassessment. See MUNICIPAL CORPORATIONS, 13.

TAXATION OF COSTS. See COSTS, 9, 10.

TAXPAYERS' ACTION. See COUNTIES, 1.

TAX TITLES.

Redemption from tax sale: Duty to redeem.

1. One who owes a legal duty, contractual or otherwise, to pay the taxes on land or redeem it from a tax sale, cannot obtain a valid tax title based on such sale; and the taking of a tax deed by him amounts to a redemption. *Olson v. McDonald*, 438

2. The mere taking of possession of land, even under a claim of ownership, after the same is sold for delinquent taxes does not obligate the possessor to redeem from such sale or disqualify him from taking a deed on outstanding tax certificates. *Ibid.*

Same: Fraudulent conveyance to infants.

3. A voluntary conveyance to infant grantees of land which is subject to the lien of an outstanding tax certificate, while ineffectual to confer upon such infants any right or title which would hinder or delay the certificate holder in respect to foreclosure and sale, is nevertheless good between the parties and entitles the grantees to assert all those rights in and to the land which, had the conveyance not been made, the grantor himself could assert against a tax title based upon such certificate. *Corry v. Shea*, 144 Wis. 135, distinguished. *Brooks v. Dike*, 152

4. The tax-title holder cannot in such a case urge the fraudulent character of a deed to the infant grantees to prevent them from attacking his tax title upon grounds which would have been available to their grantor, or from redeeming within the time redemption could have been made had the deed to the infants never been executed. *Ibid.*

5. Even if such infant grantees, by reason of taking with knowledge that the purpose of the deed was to hinder and delay the holder of the tax certificate, were to be regarded as in equal delict with their grantor, they would not be thereby barred from maintaining an action to quiet title as against the grantee in a tax deed who took the same without giving notice of his application therefor in a case where such notice was required. *Ibid.*

Quieting title: Conditions of judgment.

6. In an action to quiet title, brought against a tax-title claimant, under sec. 3186, Stats., if the tax deed be adjudged void the plaintiff will be entitled to judgment upon making the payments mentioned in sec. 1210*h*. *Brooks v. Dike*, 152

TENANCY FROM YEAR TO YEAR. See LANDLORD AND TENANT, 9–11.

TIME: Reasonableness. See LOGS AND TIMBER, 2.

TITLE TO LAND. See ADVERSE POSSESSION. CANCELLATION OF INSTRUMENTS. CONTRACTS, 4. DEDICATION. DEEDS. EJECTMENT. EVIDENCE, 6. FIXTURES, 2. HUSBAND AND WIFE. JUDGMENT, 4. LIENS. LIS PENDENS. NAVIGABLE WATERS. PLEADING, 7. TAX TITLES. TRESPASS.

TOWNS. See BRIDGES. COSTS, 7. HIGHWAYS. JUDGMENT, 6, 7.

TRANSACTIONS WITH DECEDENTS. See WITNESSES, 1–3.

TRESPASS.

See COSTS, 3–5. DAMAGES, 2. PLEADING, 7. NAVIGABLE WATERS, 1–7.

1. If the plaintiff in an action for trespass on land was not in possession he must prove his title; and a trespasser on unoccupied land can be made to respond in damages to the owner only. *Kneeland-McLurg L. Co. v. Lillie*, 428

2. A written contract whereby the owner of land granted the right to buy, cut, and remove standing timber thereon, and the grantee agreed to buy, cut, and remove such timber within a certain time and to pay a certain purchase price for the right granted, was, when executed and the purchase price paid, a conveyance of the title to the standing timber and hence a conveyance of an interest in land; and a transferee of the interest of such grantee was entitled to maintain an action under sec. 4269, Stats., against one who wrongfully cut the timber. *Bretz v. R. Connor Co.* 140 Wis. 269; *Golden v. Glock*, 57 Wis. 118, and other cases, distinguished. *Ibid.*

TRESPASSERS: Injuries to: Liability. See NEGLIGENCE, 3, 4. RAILROADS, 28.

TRIAL.

Reception of evidence: Rebuttal.

1. How wide a range evidence in rebuttal shall take is very much a matter of discretion with the trial court, and unless there is a clear abuse of discretion in excluding testimony such exclusion cannot be held error. *Dixon v. Russell*, 161

2. While the exclusion of evidence offered in rebuttal merely because it should have been offered in chief might constitute error if it related to a material issue upon which the evidence was close and conflicting, it is otherwise where the offered evidence is not very material. *Ibid.*

Same: Striking out evidence. See MUNICIPAL CORPORATIONS, 8.

Questions of fact for jury. See ANIMALS, 2. ATTACHMENT, 1. MASTER AND SERVANT, 3, 9–11, 13, 16, 17. NEGLIGENCE, 2. PARTNERSHIP, 1. RAILROADS, 13, 14, 16, 18, 21–23, 25, 26, 32. STREET RAILWAYS, 11.

Direction of verdict. See STREET RAILWAYS, 11.

Instructions to jury. See INSTRUCTIONS TO JURY.

Special verdict: When matter of right.

3. Under sec. 2858, Stats. 1913, making a special verdict, when duly demanded, a matter of right, it is error to refuse to submit a special verdict in a case in which, upon the evidence, there are several material, controverted issues of fact. *Tobin v. Nichols*, 235

Same: Form. See VENDOR AND PURCHASER, 3, 4.

4. The submission to the jury of a question as to whether plaintiff was instructed, prior to his injury, not to do his work in the manner in which he was doing it when injured, was not prejudicial error, although such question related to a mere evidentiary fact, where that point was sharply litigated on the trial and all the ultimate issuable facts were covered by the other questions of the special verdict. *Dixon v. Russell*, 161

5. Refusal to submit a particular question in a special verdict was not error where one of the questions submitted, together with the instructions thereon, sufficiently covered the material fact in issue. *Hilden v. Great Lakes C. & D. Co.* 295

Same: Omitted matters: Finding by court. See CONTRACTS, 6.

6. Where the controversy was as to whether defendants, through whom as agents plaintiff bought an automobile, made for themselves, independently of the written agreement between their principal and plaintiff, an oral agreement to take the car back if it did not prove satisfactory, and a question submitted in the special verdict was supposed by counsel on both sides and by the court as well to cover that issue, and the jury so understood it and found thereon, upon sufficient evidence, in plaintiff's favor, it was error for the court afterwards, upon the theory that the verdict did not cover that vital issue, to find thereon and render judgment in favor of defendants. *Cooper v. Huerth,* 346

Same: Changing findings of jury. See APPEAL, 20. RAILROADS, 21.

TRUST COMPANIES. See BANKS AND BANKING. CORPORATIONS, 3.

TRUSTS AND TRUSTEES. See BANKS AND BANKING. MASTER AND SERVANT, 32. WILLS, 2–10.

UNDERTAKINGS. See APPEAL, 6. EJECTMENT, 5–8.

UNGUARDED MACHINERY. See MASTER AND SERVANT, 2, 13–17, 29.

USAGES AND CUSTOMS. See CUSTOMS.

VALUE. See EVIDENCE, 1, 10. MUNICIPAL CORPORATIONS, 9. SALES, 15, 16. WILLS, 7.

VENDOR AND PURCHASER OF LAND.

See CANCELLATION OF INSTRUMENTS. CONTRACTS, 4. DEEDS. EVIDENCE, 6. FIXTURES, 2. LIS PENDENS.

Liens: Purchasers without notice. See LIENS.

False representations by vendor: Damages.

1. A finding by the jury to the effect that plaintiff could not by the exercise of ordinary observation have known, when he purchased a farm of 120 acres, that there were but sixty-six acres under plow, instead of eighty acres as represented by defendants, is *held* to be sustained by evidence showing, among other things, that plaintiff and defendants spent several hours walking over the farm, but that a marsh divided it into two parts with cultivated land on each side, and that plaintiff, a Hollander, had less familiarity than the average man with our unit of land measures. *Westra v. Roberts,* 230

2. Such representation as to the quantity of land under plow related to a fact materially affecting the value of the farm, and it having been made under such circumstances that plaintiff was justified in relying thereon, and he having purchased the farm in reliance thereon and thereby suffered damage, he is entitled to recover. *Ibid.*

3. Where questions were submitted in answer to which the jury found that for the purpose of inducing plaintiff to purchase a farm defendants made false representations as to the quantity of land under plow, that he believed such representations and relied upon them in making the purchase, and that he did not

know their falsity and could not by ordinary observation have known thereof, there was no error in refusing to submit other questions as to whether plaintiff exercised "due diligence as an ordinary prudent man would to ascertain whether the representations were true or not," and whether he had "ample opportunity to ascertain whether the representations were true or untrue before the closing of the sale." *Ibid.*

4. In the question "Did the plaintiff, when he purchased said farm, actually know how many acres were under plow?" and in an instruction relative thereto, the trial court did not by the use of the word "actually" require the jury to find that plaintiff knew the *exact* quantity of plowable land before they could answer the question in the affirmative. *Ibid.*

5. The instructions in this case relative to the question of damages are *held* clearly to have limited the jury to the damage sustained by reason of the false representations as to the number of acres under plow, and none other. *Ibid.*

VERDICT. See TRIAL, 3–6.

VIADUCTS. See MUNICIPAL CORPORATIONS, 5–13.

VOLUNTARY CONVEYANCE. See TAX TITLES, 3–5.

WAIVER.

1. Waiver is the intentional relinquishment of a known right, benefit, or advantage. *Zwietusch v. Luehring*, 96

2. Where the facts and circumstances relating to the subject are admitted or clearly established, waiver becomes a question of law, but if different inferences may be drawn from the evidence a question of fact is presented. *Ibid.*

Of objection that remedy at law is adequate. See EQUITY.
Of objections to charge. See INSTRUCTIONS TO JURY.
Of claim for rent. See LANDLORD AND TENANT, 5.
Of lien. See LIENS.
Of claim against one partner. See PARTNERSHIP, 3.
Of defects in complaint. See PLEADING, 1, 2.
Of objection that case is governed by federal statute. See RAILROADS, 35.

WARRANTY. See PRINCIPAL AND AGENT, 1–3. SALES, 1–6, 8, 9.

WATERS. See NAVIGABLE WATERS.

WATERWORKS. See PUBLIC UTILITIES.

WILD ANIMALS. See ANIMALS, 1, 2.

WILLS.

Construction: "Husband:" Effect of divorce judgment.

1. Where, while an action by a husband for a divorce was pending, the wife made her will giving her personal property to him "providing he is my husband at the time of my decease," and within a year after judgment of divorce was granted pursuant to sec. 2374, Stats., the wife died, it is *held* that he was not, within the meaning of the will, her husband at the time of her decease. *Rogers v. Hollister*, 517

Same: Devise in trust: Termination of trust.

2. Under a will devising property in trust and, after making certain provisions as to payment of the income to a daughter-

in-law (widow of a deceased son) and her two minor children, providing that upon the death or remarriage of said daughter-in-law the trustee should "pay, assign, transfer and set over unto my said two grandchildren the entire fund and estate," it is *held* that the marriage of the daughter-in-law terminated the trust and fixed the time for distribution of the trust estate, and, she having been appointed guardian of the persons and estate of the children, the trustee should turn over the property to her for them. *Will of Rose: Hahn v. Leahy*, 570

Same: Trusts: Life estates: "Income" and corpus of estate: Dividends on corporate stock: Fees and expenses of executors and trustees.

3. In a will creating a trust, with provisions for keeping intact for a long period the *corpus* of the estate and paying the "net annual income" to certain beneficiaries for life, it is *held* that the corporations referred to were not corporations which the executors were by the will directed or authorized to create, but were corporations in which the testator owned stock at the time of his death; that the words "capital invested" did not mean capital stock, but the property or means of the corporation; and that the direction as to division of dividends was not limited to cases where the corporation had made sale of some large portion or the whole of its property and had formally or practically divided the proceeds among the stockholders. *Estate of Wells*, 294

4. Where a testator establishes a trust in corporate stock for the benefit of a life tenant, with remainder over to another, dividends on the stock which are not paid out of the earnings but are really divisions of the capital of the corporation constitute a part of the principal of the trust and should not be treated as income, unless the testator intended that they should be so treated. *Ibid.*

5. Under the provision of the will above stated, the determination of the executors and trustees as to the apportionment of dividends between income and *corpus* of the estate must be deemed final and conclusive on every beneficiary, in the absence of bad faith, fraud, or mere arbitrary action. *Ibid.*

6. The fees and expenses of the executors in matters relating purely to the administration of the estate being properly chargeable to *corpus*, and their fees and expenses as trustees in the management of the trust property being properly chargeable against the income, the apportionment of such fees and expenses made by the trial court is affirmed, not being against the preponderance of the evidence. *Ibid.*

7. As to the value of the services of the executors and the proportionate amount chargeable against the two funds, the trial court was entitled to exercise its own judgment and was not bound by the testimony of witnesses. *Ibid.*

8. Where a trust is created in funds of which the income is to be paid to certain beneficiaries for life and the principal to others on the termination of the life estate, and the trustees invest a part of the funds in securities at a premium, the trustees should take from the annual income and add to the *corpus* such sum as will under established rules at the maturity of the securities repay to the *corpus* the amount paid as premium, and pay to the life tenant the balance only of the annual income. *Ibid.*

9. Whether there is any logical difference in the rules of law which should apply to securities held by the testator at a premium and to securities purchased by the executors at a premium, is not decided in this case. It being clear that the testator intended primarily that the principal or *corpus* of the estate should at all hazards be preserved intact, it is *held* that, as to both classes of securities above mentioned, sinking funds were properly created by setting aside a portion of the annual interest received thereon, and that such sinking funds should remain in the *corpus* of the estate notwithstanding the subsequent sale of some of the securities at a price which left a small balance in the sinking fund. *Ibid.*

10. Courts will not, in the absence of fraud, bad faith, or wilful abuse of discretionary power, interfere with the discretion of corporate directors and compel the declaration of a dividend; hence, although in this case the executors as individuals owned stock in certain corporations, which together with the stock owned by the estate constituted a majority of the stock, and did not compel an annual distribution of the earnings of such corporation but permitted such earnings to be added to the surplus account, thus enhancing the value of the stock, the court should not, in the absence of bad faith or fraud, surcharge the executors' account by taking from the *corpus* of the estate the amount of such enhancement and treating it as income. *Ibid.*

WITNESSES.

Competency: Transactions with decedents.

1. In replevin against the father of plaintiff's deceased husband, the question being whether or not defendant gave the property in question to the deceased, plaintiff was not incompetent to testify that, when defendant brought the property to the farm on which she and her husband resided, he said he gave it to them and they could do what they liked with it—there being no showing that the deceased was present when that statement was made or that it was any part of any communication or transaction between the defendant and the deceased or between the witness and the deceased. *Weissman v. Weissman*, 26

2. In an action by heirs of a lessor to recover rent from alleged assignees of the lease, a defendant who took the assignment in his own name though in fact for the benefit of himself and his codefendants, all of whom were stockholders in a corporation which they sought thereby to reorganize, and who, in turn, transferred the same to a new corporation organized by them,—was incompetent under sec. 4069, Stats., to testify to a conversation with the deceased lessor, although he claimed to hold his stock merely as agent of a lumber company of which he was a stockholder and officer. *Zwietusch v. Luehring*, 96

3. In such action, statements made by the attorney of the deceased lessor to one of the defendants in the presence of the lessor, would be immaterial unless concurred in by the client, and if concurred in that fact could not be shown by such defendant. *Ibid.*

Refreshing memory.

4. A witness should not be allowed to refresh his memory by using a writing made by another person, unless he knows it to be correct. *Toepfer v. Sterr*, 226

Cross-examination.

5. Where a witness, though present at the time of an accident, did not testify in chief as to how it happened, and the record fails to show that he knew or claimed to know how it occurred, there was no error in refusing to permit him to be cross-examined on that subject. *Dixon v. Russell,* 161

WORDS AND PHRASES.

Where the same word or phrase is used in different sections of the same statute for different objects and in different context, it need not be given the same meaning in each section. *State ex rel. City Const. Co. v. Kotecki,* 278

Abutting property, in statute. See MUNICIPAL CORPORATIONS, 6.
Actually, in special verdict. See VENDOR AND PURCHASER, 4.
Any corporation, in statute. See TAXATION, 3.
Capital. See CORPORATIONS, 1.
Capital invested, in will. See WILLS, 3.
Capital stock. See CORPORATIONS, 1.
Complete system of waterways, etc., in statute. See MUNICIPAL CORPORATIONS, 17, 18.
Consideration, in statute. See FRAUDS, STATUTE OF, 5.
Estoppel in pais. See ESTOPPEL.
Fellow-servants. See MASTER AND SERVANT, 24.
Guaranty, in contract. See FRAUDS, STATUTE OF, 2, 3.
Highwater mark. See NAVIGABLE WATERS, 5.
Husband, in will. See WILLS, 1.
In the state, in statute. See TAXATION, 2.
Machine, tool or implement, etc., in statute. See BURGLARY.
Manifest prejudicial error, in statute. See APPEAL, 13–15.
Net annual income, in will. See WILLS, 3–5, 8–10.
Old garbage plant, in contract. See MUNICIPAL CORPORATIONS, 3.
Performing service growing out of and incidental to his employment, in statute. See WORKMEN'S COMPENSATION ACT, 1.
Proper order, in franchise. See STREET RAILWAYS, 4–7.
Proper repair, in franchise. See STREET RAILWAYS, 4–7.
Public buildings, on plat. See DEDICATION, 2, 3.
Public work or improvement, in city charter. See MUNICIPAL CORPORATIONS, 4.
Reasonable time. See LOGS AND TIMBER, 2.
Regulation, in franchise. See STREET RAILWAYS, 8–10.
Separate sale, in statute. See MUNICIPAL CORPORATIONS, 27.
Seventy-four degree gasoline, in contract. See SALES, 9.
Subject of the action, in statute. See PLEADING, 7.
Taken, in statute. See APPEAL, 6.
Track repairing, in statute. See RAILROADS, 36.
Waiver. See WAIVER, 1.
Wild land, in statute. See COSTS, 3.

WORKMEN'S COMPENSATION ACT.

See MASTER AND SERVANT.

Construction: "Performing service growing out of and incidental to his employment:" Remedies.

1. When a city employee reported to his foreman, received his instructions for the day, and proceeded to carry out such instructions by starting for the place where he was to work, the re-

lation of master and servant commenced, and in walking to the place of work he was "performing service growing out of and incidental to his employment," within the meaning of sec. 2394—4, Stats. 1911. *Milwaukee v. Althoff*, 68

2. Where at a time when he is "performing service growing out of and incidental to his employment," a city employee is injured by reason of a defective sidewalk, the liability provided for by the Workmen's Compensation Act is in lieu of any other liability whatsoever, and his remedy against the city is under that section and not under sec. 1339, Stats. *Ibid.*

Same: Injury by tort of another: Assignment of cause of action.

3. Where, under sec. 2394—25, Stats. 1913, an employer becomes the owner of a cause of action in tort which an injured employee "may have against any other party for such injury," the employee may assign such cause of action and the assignee, as the real party in interest, may sue thereon. The provision in said section that "such employer may enforce in his own name the liability of such other party" was not intended to render the cause of action nonassignable. *McGarvey v. Independent O. & G. Co.* 580